

# LEAD ARTICLE

## Sovereign Indignity? Values, Borders and the Internet: A Case Study

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"I would hope one would see a greater deal of respect from our [American] neighbors for a decision that has been taken by a [Canadian] judge."  
Ontario Premier Bob Rae<sup>1</sup>

"With due respect to Canada's sovereign power and the judge's sincerity, his action is both futile . . . and wrong in principle."  
*The New York Times*<sup>2</sup>

## INTRODUCTION

On June 29, 1991, the body of a young girl, dismembered and encased in seven blocks of concrete, was discovered by fishermen at the bottom of Lake Gibson, near Thorold, Ontario.<sup>3</sup> It would be more than a week before Niagara Regional Police could identify the body as that of Leslie Erin Mahaffy, a Burlington teenager who had disappeared two weeks earlier.<sup>4</sup>

The following spring, fifteen-year-old Kristen Dawn French was forced into a car one midafternoon not far from her home in the north end of St. Catharines.<sup>5</sup> Two weeks later, on April 30, 1992, her naked body was found in the brush off a side road in north Burlington.<sup>6</sup>

As a bizarre story of kidnapping, sexual torture, and murder unfolded, horrifying and fascinating the Golden Horseshoe area of southern Ontario, local press coverage was intense, unrelenting, and

1. Sandra Rubin, *Canadian Cable Operators Pull Plug as U.S. Stations Break Teale Ban*, MONTREAL GAZETTE, Dec. 1, 1993, at B1.

2. *A Bad Gag Order in Canada*, N.Y. TIMES, Dec. 4, 1993, at 1-20.

3. Cal Millar & Bruce Campion-Smith, *Body in Concrete Identified as Girl*, 14, from Burlington, TORONTO STAR, July 11, 1991, at A1.

4. *Id.*

5. Nick Pron & John Duncanson, *Police Link Kidnapping; Friends on Alert After St. Kitts Teen Disappears*, TORONTO STAR, Apr. 19, 1992, at A1.

6. Donovan Vincent, *Slain Girl, 15, Discovered Beside Road in Burlington*, TORONTO STAR, May 1, 1992, at A1.

sensational.<sup>7</sup> But the story scarcely registered with the great U.S. media machine to the south.<sup>8</sup>

On May 18, 1993, Paul Bernardo and Karla Homolka, husband and wife, were formally charged with both crimes.<sup>9</sup> On July 6, Homolka pleaded guilty in a St. Catharines courtroom to the two manslaughter charges laid against her.<sup>10</sup> She was convicted the same day by Justice Francis Kovacs, who sentenced her to twelve years in prison.<sup>11</sup>

What might have remained merely grist for the tabloids attracted international media scrutiny when Justice Kovacs put the story off limits to all reporters, Canadian and foreign alike.<sup>12</sup> Overnight, the story drew the attention of publishers and broadcasters, lawyers and legal scholars, college students and computer hackers throughout Canada and the United States.<sup>13</sup>

At the time of Homolka's conviction, Paul Bernardo faced two first-degree murder charges in connection with the deaths of Mahaffy

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7. This Article will track the Homolka-Bernardo story largely through the pages of *The Toronto Star* because of the thorough coverage it gave to this story from July 1991 on and its contemporaneous accessibility through NEXIS. *Toronto Sun* reporters Alan Cairnes and Scott Burnside also covered the story from the beginning, as did *St. Catharines Standard* reporter Ann Marie Owens. Other papers covering the story were the *Toronto Globe and Mail* and the *Kingston Whig-Standard*. Several competing books and screenplays by reporters and others were under contract very early on. Susan Walker, *Bernardo Arrest Sparks TV, Film and Book War*, TORONTO STAR, Apr. 24, 1993, at A1.

8. *The Buffalo News*, for example, did not begin covering the story until December 1992. Janice L. Habuda, *Police Find 911 Caller in Teen Slaying*, BUFFALO NEWS, Dec. 4, 1992, available in LEXIS, NEWS Library, ARCNWS File. Of the NEXIS "Major Newspaper Files," only the *St. Petersburg Times* carried brief items on the story in 1992, and they were buried in larger multisubject features. Jim Fox, *Ontario May Allow Gambling*, ST. PETERSBURG TIMES, Apr. 26, 1992, at 22A; Jim Fox, *Ontario Hit with Tax Hikes*, ST. PETERSBURG TIMES, May 3, 1992, at 30A. The arrest of Paul Bernardo in February brought additional coverage from *Newsday* and the *Orlando Sentinel Tribune*. *Sex Crimes Suspect*, NEWSDAY, Feb. 19, 1993, at 14; *Second Suspect in Deaths Being Watched in Canada*, ORLANDO SENTINEL, Feb. 21, 1993, at A18.

9. Cal Millar & Nick Pron, *Bernardo and Wife Charged in Slayings; Homolka Accused of Manslaughter in Mahaffey, French Cases*, TORONTO STAR, May 19, 1993, at A1. Paul Bernardo legally changed his name to Paul Jason Teale on Feb. 13, 1993, allegedly because of a family rift, but this article will generally refer to him as Bernardo and to his wife as Homolka to avoid confusion. *Suspect Changed Name a Week Before His Arrest*, TORONTO STAR, Feb. 26, 1993, at A4.

10. John Duncanson & Nick Pron, *Homolka Enters Plea; Families of Slain Girls in Tears*, TORONTO STAR, July 6, 1993, at A1.

11. Nick Pron & John Duncanson, *Homolka Gets 12 Years*, TORONTO STAR, July 7, 1993, at A1.

12. See, e.g., *Canada Bans U.S. Media from Manslaughter Trial*, WALL ST. J., July 6, 1993, at B2; Anne Swardson, *Canada Bars U.S. Media from Trial; Judge Fears Publicized Evidence Would Prejudice Related Case*, WASH. POST, July 7, 1993, at A25.

13. See *infra* text accompanying notes 234-69.

and French, as well as fifty-three other related and unrelated charges.<sup>14</sup> His trial had not yet been scheduled, however, and Justice Kovacs feared that details of the case against Homolka and her plea would jeopardize the integrity of Bernardo's trial.<sup>15</sup>

Over the objection of Bernardo's own defense team, Justice Kovacs closed Homolka's trial to all but accredited Canadian journalists, families of the victims and accused, and a handful of court officials.<sup>16</sup> He also prohibited publication, until after Bernardo's trial, of all aspects of Homolka's trial except for the barest description of Homolka's indictments and sentence.<sup>17</sup>

While the mainstream Canadian media complied in good faith with Justice Kovacs's order, even as they challenged it in court, information and speculation about the Homolka trial and the events leading up to it began flowing over the Internet within weeks. For a handful of activists with access to this vast international network of computer networks, defying the publication ban began as something of a sport. Later, it would become the focus of vigorous debate about Canadian constitutional values.

Meanwhile, the combination of a sensational murder mystery, government censorship of the press, and a convenient source of information and rumor proved too much for the American media to resist. Soon Canadians without access to the Internet were learning the proscribed details from U.S. television, newspapers, and magazines that leaked through the barriers erected by the Ontario government.

Still unable to report what they knew, Canadian media companies pressed their case before a markedly unsympathetic Court of Appeal for Ontario. That court reserved judgment on that matter until the Supreme Court of Canada could decide certain jurisdictional questions in an unrelated publication ban case.

When *Dagenais v. Canadian Broadcasting Corp.*<sup>18</sup> was published on Dec. 8, 1994, it did far more than settle procedural questions. For the first time in Canadian jurisprudence, the Supreme Court put the constitutional value of free press on an equal footing with that of fair trial.<sup>19</sup> It also ordered judges to balance the deleterious effects on free expression of a proposed publication ban, not merely against the

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14. R. v. Bernardo, [July 5, 1993] No. 125/93, O.J. No. 2047, para. 2-3 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>.

15. *Id.* paras. 130-34.

16. *Id.* para. 140.

17. *Id.* paras. 141-43.

18. [1994] 3 S.C.R. 835.

19. See *infra* note 508 and accompanying text.



objective of preserving a fair trial, but also against the effectiveness of the ban in achieving that objective.<sup>20</sup>

The *Dagenais* decision claimed for the Supreme Court of Canada exclusive jurisdiction to hear appeals from publication bans imposed by superior court judges such as Justice Kovacs.<sup>21</sup> Consequently, the action before the Court of Appeal for Ontario was dismissed for lack of jurisdiction,<sup>22</sup> and the media refiled their appeal before the Supreme Court of Canada.<sup>23</sup> On May 4, 1995, the Supreme Court of Canada, without opinion, refused to hear their challenge, presumably because the Kovacs gag order would expire by its own terms before the Court could hear the case.<sup>24</sup>

Indeed, Paul Bernardo's trial began just two weeks later,<sup>25</sup> with prosecutors revealing all of the details of the kidnappings, rapes, tortures, and murders that previously could not have been reported.<sup>26</sup> On September 1, 1995, after a fifteen-week trial featuring videotapes of his sexual abuse and the testimony of Karla Homolka, Bernardo was convicted and sentenced to life in prison for the first-degree murders

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20. See *infra* notes 509-31 and accompanying text.

21. See *infra* notes 497-98 and accompanying text.

22. *Thomson Newspapers Ltd. v. R.* [1994] 121 D.L.R.4th 42, 47 (S.C.C.). See also John Duncanson, *Appeal of Homolka Ban May Go Right to Top Court; Move by Media Outlets Follows Recent Ruling*, TORONTO STAR, Dec. 20, 1994, at A5.

23. Application for leave to appeal to the Supreme Court of Canada, filed by Canadian Broadcasting Corp., Feb. 22, 1995 (No. 24579). *Thompson Newspapers Ltd.*, 121 D.L.R.4th at 42; *Canadian Broad. Corp. v. R.*, [May 4, 1995] No. 24579 (S.C.C.) (unpublished) (visited Dec. 13, 1997) <<http://www.droit.umontreal.ca/doc/csc-scc/en/bull/1995/html/95-05-05.bul.html>> (dismissing application for leave to appeal). See also Canadian Press, *Media to Appeal Gag Order to Top*, MONTREAL GAZETTE, Dec. 19, 1994.

24. *Top Court Won't Hear Challenge to Homolka Gag*, MONTREAL GAZETTE, May 5, 1995, at A8.

25. Among the many factors that delayed Bernardo's trial was the inability of the police to find the videotapes of his criminal acts that Homolka had told them were hidden in his house. The tapes were discovered by defense attorneys, but withheld from authorities for more than a year. NICK PRON, *LETHAL MARRIAGE* 390-91 (1995).

26. Sarah Davison, *Canada Lifts Veil of Silence on Gruesome Murder*, Reuters World Service, May 18, 1995, available in LEXIS, ARCNWS Library, TXTNWS File. The trial judge, Justice Patrick LeSage, had previously barred the media from publishing information about the impact of the murders on the victims' families, but he rejected the Crown's petition to prohibit journalists from reporting anything that happened during pretrial phase of Bernardo case until a jury was selected. *R. v. Bernardo*, No. 274/94, 1995 Ont. C.J. LEXIS 517 (Ont. Gen. Div. Feb. 10, 1995). See also Canadian Press, *Judge Rejects Total Gag in Bernardo Case*, CALGARY HERALD, Feb. 11, 1995, at A9. When the trial began, Justice LeSage refused to allow the CBC to televise it, and his order allowing the press and public to hear, but not watch, Bernardo's gruesome videotapes was allowed to stand by the Supreme Court of Canada. Stephen Bindman, *Court Quashes Bid to Silence Videos*, EDMONTON J., June 16, 1995, at A11; Canadian Press, *Judge Rejects CBC Bid for TV Hearing*, CALGARY HERALD, March 9, 1995, at A12.

of Leslie Mahaffy and Kristen French.<sup>27</sup> In November, Justice Patrick LeSage ruled that Bernardo was a "dangerous offender," resulting in indeterminate sentences on related criminal counts.<sup>28</sup>

This Article focuses on the publication ban issued by Justice Kovacs in the Karla Homolka trial and the reaction to it as a case study of the new global communications environment. Part I reconstructs the factual circumstances that provoked the ban, as well as the responses of the media, the legal establishment, and the public. Part II examines the ban itself, the constitutional challenge mounted by the media, and the landmark *Dagenais* decision. Part III reflects on the meaning of the entire episode for law, journalism, and national sovereignty.

The Article concludes that the publication ban in this case, by influencing the *Dagenais* decision, ultimately increased the constitutional protections afforded the Canadian media. Furthermore, the Article concludes that the Internet has proven its capacity to facilitate civil resistance to ill-considered restrictions on free speech even when conventional news media have been legally restrained. In view of this technological change, journalists in both the United States and Canada would do well to reconsider ethical norms that may interfere with their prime imperative to report the news. The Article additionally concludes that the *Dagenais* decision demonstrates the continued independence from American influence of Canadian judicial thinking, even where the two legal regimes have moved closer together.

## I. THE MAHAFFY-FRENCH MURDERS

### A. Investigation and Arrest

Despite countless false starts and missed opportunities, the investigation of the Mahaffy-French murders ultimately led to the arrest of Karla Homolka and Paul Bernardo. This section discusses the police investigation and accompanying extensive media coverage that resulted in Justice Kovacs's imposing a publication ban. Following a description of pretrial, trial, and sentencing proceedings in the case,

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27. *Canadian Sex Killer Jailed for Life*, INDEPENDENT (London), Sept. 2, 1995, at 12; Fred Langan, *25 Years for Rapist Who Murdered Two Schoolgirls*, DAILY TELEGRAPH, Sept. 2, 1995, at 10.

28. *Canadian Murderer Gets Life in Prison*, Reuters World Service, Nov. 3, 1995, available in LEXIS, ARCNEWS Library, TXTNEWS File. See also *R. v. Bernardo*, No. 274/94, 1995 Ont. C.J. LEXIS 3353 at \*10 (Ont. Gen. Div. Oct. 13, 1995) (allowing Crown to proceed with "dangerous offender" designation); Criminal Code, R.S.C., ch. C-46, § 753(4) (1985) (Can.) (prescribing indeterminate sentence for "dangerous offenders").

this section ends with a discussion of the defiance and enforcement of the publication ban.

The last any of her friends heard from Leslie Mahaffy was a telephone call that she made from a convenience store near her Burlington home around 2:00 a.m. on June 15, 1991.<sup>29</sup> Shortly after her body was found and identified, *The Toronto Star* (*Star*) reported that detectives were trying to track down a man in his mid-thirties who had entered the store after Mahaffy left and asked the clerk about her.<sup>30</sup> That was just one of the many rumors, later proved untrue, that police complained were hampering their investigation.<sup>31</sup> With a \$25,000 reward for information that would help the police solve the crime, the flood of reports coming in to police was so great that a special hotline was set up to receive them.<sup>32</sup> Typical was an anonymous call from a woman who said she had seen a suspicious automobile hauling concrete in Thorold on July 5.<sup>33</sup> The tip led nowhere, and police were frustrated by the absence of productive leads when Mahaffy was buried on July 26.<sup>34</sup>

On August 9, however, police released a composite drawing of a man reportedly seen in the convenience store parking lot around the time Mahaffy disappeared.<sup>35</sup> By then, eleven Niagara and Halton regional detectives had pursued more than 100 tips and interviewed hundreds of people.<sup>36</sup> The following week, similarities surfaced between the composite drawings of the man wanted for questioning and the so-called Scarborough rapist, who was thought to be responsible for eight sexual assaults between May 1987 and May 1990.<sup>37</sup> Toronto Metro police were called in to help with the Mahaffy investigation.<sup>38</sup>

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29. Frank Calleja, *\$25,000 Reward Posted to Find Leslie's Killer*, TORONTO STAR, July 16, 1991, at D23; Bruce Campion-Smith, *Teen Slain After Saying Goodbye to Friend*, TORONTO STAR, July 12, 1991, at A24.

30. Campion-Smith, *supra* note 29, at A24.

31. Will Gibson, *Rumors Hamper Probe of Murder, Police Complain*, TORONTO STAR, July 16, 1991, at A8.

32. Calleja, *supra* note 29, at D23.

33. Caroline Mallan, *Anonymous Tipper Asked to Call Police*, TORONTO STAR, July 19, 1991, at A6.

34. Bruce Campion-Smith, *Police Seek Help in Search for Girl's Killer*, TORONTO STAR, July 25, 1991, at D21; Bruce Campion-Smith, *Grieving Family, Friends Bury Slain Teen*, TORONTO STAR, July 26, 1991, at A6.

35. Paul Kidd, *Police Seek Man for Questioning in Teen's Slaying*, TORONTO STAR, Aug. 9, 1991, at A10.

36. *Id.*

37. *Police Probe Link in Murder, Rapes*, TORONTO STAR, Aug. 16, 1991, at A7.

38. *Id.*

For months to come, the Mahaffy case was mentioned in virtually every story about the abduction or murder of a young woman in southern Ontario,<sup>39</sup> but there were no new connections. At first, the story of Kristen French's disappearance on April 18, 1992, seemed no different.<sup>40</sup> French was apparently abducted two days earlier from the parking lot of a St. Catharines church while walking home from school; police had found a shoe and a piece of cloth in the area and were said to be looking for a beige Camaro or Firebird.<sup>41</sup> This time, however, the police were openly connecting the two cases, as well as a third disappearance that had occurred in November.<sup>42</sup> A special "Project Green Ribbon" task force was set up specifically to investigate "any possible connection" among the three cases,<sup>43</sup> but the only leads came from witnesses who reported seeing a light-colored Camaro speeding erratically away from the spot where French was reportedly kidnapped.<sup>44</sup>

On April 30, police discovered the worst possible connection between the French and Mahaffy cases: French's naked body was found in Burlington, just two miles from Mahaffy's house.<sup>45</sup> For the first time, however, police were saying they had "a number" of suspects in the case and anticipated making an arrest.<sup>46</sup> Police decried premature news stories that French had been held for ten days before she was murdered by a serial killer,<sup>47</sup> but later confirmed that she had been alive for thirteen days before she was strangled.<sup>48</sup> Responding

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39. See, e.g., John Duncanson & Nick Pron, *Man Charged with Murder of Teenager*, TORONTO STAR, Feb. 12, 1992, at A1; Kellie Hudson & Maureen Murray, *Women Take Back the Night to Demand an End to Violence*, TORONTO STAR, Sept. 20, 1991, at A6; Cal Millar, *Officers Note Similarities in DeVilliers, Mahaffy Cases*, TORONTO STAR, Aug. 14, 1991, at A4; Lindsay Scotton, *The Killing Goes On*, TORONTO STAR, Nov. 30, 1991, at E1; *Police to Search for Missing Teen in Area Where Another Body Found*, TORONTO STAR, Dec. 22, 1991, at A10.

40. *Niagara Teenager Missing*, TORONTO STAR, Apr. 18, 1992, at A1.

41. Andrew Duffy, *Clues Hint at Tragedy as Police Hunt Missing Teen*, TORONTO STAR, Apr. 18, 1992, at A2.

42. Nick Pron & John Duncanson, *Police Link Kidnapping; Friends on Alert After St. Kitts Teen Disappears*, TORONTO STAR, Apr. 19, 1992, at A1.

43. Moira Welsh, *Task Force Seeks Links in 3 Teens' Abductions*, TORONTO STAR, Apr. 22, 1992, at A1. See also *infra* discussion at note 107.

44. Nick Pron, *Witness in Near-Crash After Abduction*, TORONTO STAR, Apr. 25, 1992, at A4.

45. Donovan Vincent, *Slain Girl, 15, Discovered Beside Road in Burlington*, TORONTO STAR, May 1, 1989, at A1.

46. Paul Kidd, *Kristen: Police Have Suspects*, TORONTO STAR, May 1, 1992, at A1.

47. Peter Edwards, *Post-Mortem Confirms Kristen Sexually Assaulted*, TORONTO STAR, May 3, 1992, at A3.

48. Moira Welsh, *Missing Teen Alive for 13 Days, Police Say*, TORONTO STAR, May 6, 1992, at A5.

to criticism from the media that they were withholding information about French's death, Niagara Regional Police assigned a senior officer to deal with the media and hold daily news conferences.<sup>49</sup> However, the investigation itself continued without notable success,<sup>50</sup> except for dropping the third disappearance from the Mahaffy-French investigation.<sup>51</sup>

Toward the end of June, police exhumed Mahaffy's body in the hope of finding additional forensic evidence,<sup>52</sup> while investigators continued to search much of southern Ontario for the elusive Camaro wanted in connection with the French case.<sup>53</sup> The summer was punctuated by the July 21 release of a U.S. FBI profile of French's killer on a Hamilton-based television show featuring a reenactment of the crime. Announcement of the program set off another squabble between police and other media who demanded the profile before the show aired.<sup>54</sup> The program produced 2,000 telephone calls and two new eyewitnesses, including one who claimed she would never forget the kidnapper's face.<sup>55</sup> Police also revealed that they had received a "911" call from a man who claimed to be the killer.<sup>56</sup>

Still, there were no real developments in the case, and the frustration led to increasing tension between the media and the police.<sup>57</sup> That tension came to a head when composite sketches of French's alleged abductors were leaked to the Toronto press and published after police refused to release sketches officially.<sup>58</sup> When two suspects in a freshly painted orange Camaro eluded police in a

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49. Bob Brent, *Police Assign Media Officer in Probe of Teen's Slaying*, TORONTO STAR, May 8, 1992, at A9.

50. See, e.g., John Duncanson, *Police Test Hair Found Near Beaverton Mall*, TORONTO STAR, May 12, 1992, at A10; John Duncanson & Nick Pron, *Man Killed Himself Day Teen's Body Found*, TORONTO STAR, May 14, 1992, at A9; *Hypnosis of Witnesses Fails*, TORONTO STAR, May 10, 1992, at A12.

51. Kellie Hudson, *Classmates Mourn Terri's Loss; Police Rule Out Foul Play, Connection to Other Teenagers' Deaths*, TORONTO STAR, May 26, 1992, at A10.

52. *Mahaffy's Body Gets New Tests for Clues*, TORONTO STAR, June 25, 1992, at A5.

53. Jim Rankin, *Police Set to Check Camaros for Killer*, TORONTO STAR, July 14, 1992, at A11.

54. John Duncanson, *FBI Profile of Slain Teen's Abductor to Be Released Only on TV Special*, TORONTO STAR, July 15, 1992, at A2.

55. Caroline Mallan & Tony Wong, *TV Appeal Nets Witnesses; 2 Men Abducted St. Catharines Teen, Police Experts Conclude*, TORONTO STAR, July 22, 1992, at A2.

56. Nick Pron, *Professed Killer Taunted Police About Kristen*, TORONTO STAR, July 23, 1992, at A1.

57. Nick Pron, *Feud with Media Slows French Case, Police Chief Says*, TORONTO STAR, July 26, 1992, at A3.

58. Andrew Duffy & Bob Brent, *Police Mum on French Sketch; Tensions Higher in Murder Probe After Latest Leak*, TORONTO STAR, July 27, 1992, at A3.

highway chase,<sup>59</sup> media relations seemed to hit an all time low, with story after story pointing out police inadequacies.<sup>60</sup> Four months after French's body was discovered, police admitted to being no closer to finding her killers.<sup>61</sup>

In early October, police released audio tapes of the man who called the "911" number in an effort to flush out a suspect.<sup>62</sup> That release generated more than 100 new leads,<sup>63</sup> but the one suspect actually questioned by police was cleared.<sup>64</sup> The real caller was found in early December,<sup>65</sup> and he claimed to have overheard the actual killers.<sup>66</sup> When that lead proved to be a hoax, police characterized it as "just another low" in this "roller-coaster ride" of an investigation.<sup>67</sup>

The new year began with yet another false lead: a beige Camaro found in an overflow channel between Locks One and Two of the St. Lawrence Seaway.<sup>68</sup> On January 30, the *Star* did a lengthy front-page reconstruction of the final days of Leslie Mahaffy, purporting to describe in gruesome detail her actions on the night of her disappearance and her killer's methodical disposal of the body.<sup>69</sup> The next day, the *Star* followed with a similar feature on the death of Kristen French, based on a lengthy interview with Inspector Vince Bevan, head of the

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59. Nick Pron & John Duncanson, *2 Suspects in Camaro Elude Police*, TORONTO STAR, July 31, 1992, at A1.

60. One *Toronto Star* reader wrote,

I have been appalled and sickened to read your coverage of the Kristen French murder investigation and of your continued publication of information that the police have chosen not to reveal. Your stance of 'freedom of the press' and 'the public has a right to know' has been taken too far. It is the decision of the police department as to whether certain information should be released to the general public. You have no right to infringe upon their authority and hamper their investigations in this manner.

Rosalyn M. Galin, Op. Editorial, *Media Should Allow Police to Do Job*, TORONTO STAR, Aug. 5, 1992, at A16.

61. Nick Pron & John Duncanson, *The Turmoil That Embroils Kristen Case*, TORONTO STAR, Aug. 23, 1992, at A1.

62. Jim Wilkes, *Police Release Tape Referring to French Slaying*, TORONTO STAR, Oct. 6, 1992, at A12.

63. *Police in French case 'Excited' at New Leads*, TORONTO STAR, Oct. 9, 1992, at A2.

64. Michael Tenszen, *Man Cleared as 911 Caller in French's Sex-Slaying*, TORONTO STAR, Nov. 11, 1992, at A8.

65. *911 Caller in French Case Found*, TORONTO STAR, Dec. 3, 1992, at A8.

66. Nick Pron & Cal Millar, *Police Find Man Who Says He Overheard French's Killers*, TORONTO STAR, Dec. 4, 1992, at A3.

67. Nick Pron, *Man Claiming He Heard Killers Admits It Was a Hoax, Police Say*, TORONTO STAR, Dec. 17, 1992, at A2.

68. John Duncanson, *Kristen Link Probed as Car Found in Canal*, TORONTO STAR, Jan. 8, 1993, at A1; Nick Pron & John Duncanson, *Another Lead Fizzles in French Case*, TORONTO STAR, Jan. 9, 1993, at A14.

69. Nick Pron & John Duncanson, *Leslie Mahaffy: The Tragedy of Her Final Days*, TORONTO STAR, Jan. 30, 1993, at A1.

investigation, who was concerned about losing funding for his now forty-member task force.<sup>70</sup> Despite the absence of good suspects, Bevan told the *Star* that investigators had plenty of leads and that a break in the case could come at any time.<sup>71</sup>

It did. After two weeks of public silence on the case, the *Star* erupted on February 18 with a dozen stories on the arrest of Paul Bernardo the previous day.<sup>72</sup> His wife, Karla Homolka, a twenty-two-year-old veterinary assistant, had already begun talking to police before the arrest, although that information would not be published until February 20.<sup>73</sup>

Instead, the "lucky break" initially reported was a DNA match in the past week that conclusively linked the Mahaffy and French murders with each other and with the Scarborough rapes.<sup>74</sup> During his interview with the *Star* two weeks earlier, Bevan had denied any connection between the two murders.<sup>75</sup> Police did say they had recently tracked down and were talking to a woman who had been involved in the murders, but they did not initially say the woman was Homolka.<sup>76</sup>

Bernardo was charged first with the Scarborough crimes:

nine counts of sexual assault with a weapon, one count of sexual assault, three counts of buggery, two counts of assault causing bodily harm, eight counts of forcible confinement, two counts of choking, eight counts of robbery, five counts of anal intercourse, two counts of aggravated sexual assault, sexual assault causing bodily harm, and sexual intercourse with a female between the ages of [fourteen] and [sixteen] years.<sup>77</sup>

He would be formally charged with the murders of French and Mahaffy the following May.<sup>78</sup>

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70. John Duncanson & Nick Pron, *Avalanche of Tips May Hide Key to Case; Why Would a Cautious Girl, Aware of the Slaying of Leslie Mahaffy and the Disappearance of Terri Anderson, Go Over to the Camaro Unless She Knew the Men Inside?*, TORONTO STAR, Jan. 31, 1993, at A10. See also Nick Pron & John Duncanson, *Future of 40-Member Task Force Linked to Funding*, TORONTO STAR, Jan. 31, 1993, at A10 [hereinafter 40-Member Task Force].

71. 40-Member Task Force, *supra* note 70, at A10.

72. Accountant, 28, *Arrested in Mahaffy, French Killings; Suspect Faces 42 Charges in Scarborough Assaults*, TORONTO STAR, Feb. 18, 1993, at A1 [hereinafter Accountant, 28, *Arrested in Mahaffy, French Killings*].

73. John Duncanson & Nick Pron, *Bernardo's Wife in Talks with Crown*, TORONTO STAR, Feb. 20, 1993, at A1.

74. Accountant, 28, *Arrested in Mahaffy, French Killings*, *supra* note 72, at A1.

75. *Id.*

76. *Id.*

77. *Id.*

78. See *infra* text accompanying note 138.

Bernardo, aged twenty-eight, was a self-employed accountant who grew up in Scarborough, married Karla Homolka in August 1991, and moved to Port Dalhousie on the outskirts of St. Catharines.<sup>79</sup> He had first come to police attention in November 1990 when he was questioned in connection with the Scarborough rapes.<sup>80</sup> Metro police said a tip in late January prompted them to make the connection.<sup>81</sup> In fact, Niagara police had questioned Bernardo in January when they were called to his house over a domestic dispute.<sup>82</sup> He had actually appeared in court January 28, charged with assaulting his wife with a flashlight; she left him shortly after the assault.<sup>83</sup>

Bernardo's arrest in connection with the Mahaffy and French murders prompted police to reexamine every other unsolved murder for some connection to Bernardo.<sup>84</sup> Investigators also said they would look into the sudden death of Homolka's sister, Tammy.<sup>85</sup> The fifteen-year-old had been found dead in her house on Christmas Eve, 1990, apparently after accidentally choking on her own vomit.<sup>86</sup>

Bernardo appeared in a Scarborough courtroom on February 18, where Crown Attorney Mary Hall asked that he be remanded into custody until March 2.<sup>87</sup> His attorney, Barry Fox, made no objection,

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79. Theresa Boyle, *Suspect Grew Up in Scarborough*, TORONTO STAR, Feb. 18, 1993, at A1.

80. Nick Pron et al., *Bernardo First Probed in '90; Scarborough Investigation 'Never Forgotten'*, TORONTO STAR, Feb. 18, 1993, at A1.

81. *Id.*

82. Nick Pron & Cal Millar, *Police Widen Slaying Probe; Bernardo Arrest Prompts New Look at Unsolved Cases*, TORONTO STAR, Feb. 19, 1993, at A6.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* Tammy Homolka died on December 24, 1990, after a gathering the night before at her family's home. Joseph Hall & Jim Rankin, *Homolka Family Reburies Teen's Body*, TORONTO STAR, July 21, 1993, at A13. She reportedly collapsed in the basement of her home late December 23 and died in the hospital the following day. *Id.* An autopsy showed she had choked to death on her own vomit following an asthma attack. *Id.* Both Karla Homolka and Paul Bernardo were at the Homolka home the night Tammy Homolka died, and rumors of foul play had persisted since Paul Bernardo's arrest. *Id.*; John Duncanson & Nick Pron, *Mysterious Death Haunts Tammy's Closest Friend*, TORONTO STAR, July 21, 1993, at A13. Tammy's body was exhumed for forensic tests and reburied on July 20, 1993. Hall & Rankin, *supra*, at A13. See also *Autopsy Results to Be Kept Secret, Chief Coroner Says*, TORONTO STAR, July 22, 1993, at A5.

Although not part of the indictment, evidence including videos linking Bernardo to Tammy's death were used at Bernardo's trial for the deaths of French and Mahaffey. John Duncanson & Nick Pron, *Tammy's Death Part of Picture, Judge Tells Jury*, TORONTO STAR May 30, 1995, at A12. After being sentenced to life for the deaths of Mahaffey and French, Bernardo pled guilty to 32 other charges, including the manslaughter of Tammy. John Duncanson & Jim Rankin, *Jailed Forever*, Toronto Star, Nov. 4, 1995, at A1.

87. Philip Mascoll, *Handcuffed Suspect Smiles in Court*, TORONTO STAR, Feb. 18, 1993, at A1.



and Justice of the Peace Jimmy Allen remanded him.<sup>88</sup> More than two dozen journalists were on hand for the thirty-second appearance.<sup>89</sup> The next day, police outlined the charges Bernardo would face in the Mahaffy and French killings: two counts of first-degree murder, two counts of forcible confinement, two counts of sexual assault, and two counts of kidnapping.<sup>90</sup> Fox told reporters that Bernardo would plead not guilty to all charges<sup>91</sup> and blasted media coverage of the arrest.<sup>92</sup> "[T]he police and media have convinced the public prior to a trial that this man is guilty," Fox said.<sup>93</sup>

### B. Press Coverage

From the day after Bernardo's arrest, the Canadian press was all over the story. Apart from the main stories on Bernardo's arrest and appearance, sidebars covered the reaction of the victims' families<sup>94</sup> and friends,<sup>95</sup> Bernardo's family<sup>96</sup> and friends,<sup>97</sup> and his "storybook

88. *Id.*

89. *Id.*

90. *Bernardo Will Plead Not Guilty, Lawyer Says*, TORONTO STAR, Feb. 19, 1993, at A1.

91. *Id.*

92. Nick Pron & Cal Millar, *Arrest Sparks 'New Look' at Other Killings, Police Say*, TORONTO STAR, Feb. 19, 1993, at A6.

93. *Id.*

94. Moira Welsh & Kellie Hudson, *Kristen's Mother 'Relieved' by Arrest*, TORONTO STAR, Feb. 18, 1993, at A2. See also *Mother Lauds Police, Blasts Media*, TORONTO STAR, Feb. 21, 1993, at A1.

95. Dale Brazao & John Duncanson, *Schoolmates Show 'Relief, Shock, Anger'*, TORONTO STAR, Feb. 18, 1993, at A1.

96. In one of the many ironies in this story, Kenneth Bernardo, the suspect's father, was scheduled to be sentenced on two counts of sexual assault on March 2, the date scheduled for Paul Bernardo's next court appearance. Philip Mascoll, *Suspect's Dad Awaits Sex Assault Sentencing*, TORONTO STAR, Feb. 20, 1993, at A15. A publication ban was ordered on the details of the charges, and the press was denied access to court files on both Bernardos. *Id.* Reached by telephone, the elder Bernardo refused to talk to anyone from the *Star*. *Id.* "You are all a bunch of slime," he was quoted as saying, "You persecute people before a trial, you misquote what people say." *Id.* See also *Bernardo's Brother Charged After Assault, Death Threats*, TORONTO STAR, Feb. 25, 1993, at A11.

Kenneth Bernardo was sentenced to nine months in prison March 31 after pleading guilty to the twenty-year-old charge. Theresa Boyle, *Ken Bernardo Jailed 9 Months for Sex Assault*, TORONTO STAR, March 31, 1993, at A3. A lawyer for Kenneth's son Paul, tried unsuccessfully to obtain a publication ban on all evidence in the case, but the judge ordered the court file sealed and upheld the earlier ban on publication of evidence that would identify the victim. *Id.* Later, some of the documents in that case were unsealed at the request of the Toronto press and lawyers for Paul. Paul Moloney, *Some Documents Unsealed in Kenneth Bernardo Case*, TORONTO STAR, Apr. 7, 1993, at A6.

97. Theresa Boyle, *Arrest Shocks Guildwood Neighbors; 'If You Knew This Guy, It Just Doesn't Make Sense,' Resident Says*, TORONTO STAR, Feb. 18, 1993, at A3.

wedding" to Karla Homolka.<sup>98</sup> The coverage was by no means entirely negative toward the suspect: an old girlfriend, convinced of his innocence, offered herself as a character witness.<sup>99</sup> Homolka's role in the investigation, her own culpability, and whether she could testify against Bernardo were also subjects of press speculation.<sup>100</sup> Second-guessing the police investigators continued unabated.<sup>101</sup>

The extensive press coverage of the Mahaffy-French murder cases soon became a story in itself. Significantly, the press also expressed concern about its own behavior during the investigation and arrest:

By now everyone who has read a newspaper or watched or listened to a Canadian newscast knows Bernardo is tall, blond, handsome and married. They know the house in Guildwood Village where he grew up and the Port Dalhousie home he's renting. They've seen his high school yearbook photo, his wedding pictures, his rented Nissan.

They've heard parents and teenagers in St. Catharines, where French lived, and Burlington, Mahaffy's hometown, speak of their wary relief at his arrest. Public and media scrutiny of these crimes have been unrelenting since Mahaffy's dismembered body was discovered encased in cement June 15, 1991, and French was found in a ditch last April 30.

The public may well have been left with the impression that the puzzle is solved, although still to come is the trial of a man, who under Canadian law is innocent until proved guilty and therefore entitled to a fair and impartial hearing.

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98. Dale Brazao, *Passionate Love Led to Storybook Wedding*, TORONTO STAR, Feb. 19, 1993, at A6. "Theirs was a large traditional wedding with hundreds of guests and, for the service, the couple went by limousine to a city park where they transferred to an open landau for the ride to church." *Id.*

99. Theresa Boyle & Joseph Hall, *Bernardo: A Man of Many Faces*, TORONTO STAR, Feb. 19, 1993, at A1. See also Sally Ritchie, *Camp Leader Recalls 'Charming' Bernardo*, TORONTO STAR, Feb. 20, 1993, at A15.

100. John Duncanson & Nick Pron, *Bernardo's Wife in Talks with Crown*, TORONTO STAR, Feb. 20, 1993, at A1. See also Jim Rankin, *Suspect's Wife a 'Victim,' Boss Says*, TORONTO STAR, Feb. 22, 1993, at A1; Michael Tenszen, *Wife Can Testify Against Spouse If She Wishes To, Lawyer Says*, TORONTO STAR, Feb. 23, 1993, at A12. The common law rule declaring one spouse incompetent to testify for the prosecution against the other spouse remains the general rule in Canada. See, e.g., *R. v. Hawkins*, No. 24633/24634, 1996 Can. Sup. Ct. LEXIS 93 at \*23-25 (S.C.C. Nov. 28, 1996). The rule has been modified by statute to render the husband or wife of a person charged with aggravated sexual assault a competent and compellable witness for the prosecution without the consent of the person charged. Canada Evidence Act, R.S.C., ch. C-5, § 4(2) (1985) (Can.). Bernardo was charged with two counts of aggravated sexual assault under Criminal Code, R.S.C., ch. C-46, § 273 (1985) (Can.).

101. Lisa Priest, *Scientists Unable to Explain Year Delay*, TORONTO STAR, Feb. 20, 1993, at A15.

But after all this news coverage is that possible?<sup>102</sup>

To answer that question, the *Star* interviewed both legal and media professionals, and, as might be expected, the responses differed. Defense attorney Earl Levy, for example, acknowledged there were some legal safeguards, including voir dire and change of venue, but doubted they would do much good:

The fact that the rape charges are in one jurisdiction and the murder in another exacerbates the problem because a jury hearing the murder charges is aware of the sexual offenses and vice versa.

The evidence can become compromised. The identification evidence by the women who were raped will be very important but the fact that [Bernardo's] photo was so prominent will cause difficulties. Will they i.d.[] him because they've seen the photos alleging he's their rapist as opposed to what they really remember?

I suspect this case is not going to be easily forgotten by the public even if it takes two years [to get to trial].<sup>103</sup>

Peter Desbarats, Dean of Journalism at the University of Western Ontario, said the coverage was not surprising:

I see no way of ever reducing the attention or whether we even want to. . . . One of the reasons we publicize cases is to alert the public to the fact an arrest has been made and to make sure the process of justice from that point on is as visible as possible.

Having the[] process public and transparent is not just so that the media can have exciting newscasts and newspaper play but it's also an important part of the justice system.<sup>104</sup>

The *Star* did not limit its coverage of the publicity surrounding the case to the experts:

"It's all people want to talk about," said Jennifer Schneider, 21, a cashier at a convenience store down the street from Paul Bernardo's rented Port Dalhousie house, now being turned upside down in a police search.

Schneider, who went to the same high school as Bernardo's wife, Karla Homolka, said residents are putting their memories of the couple under a microscope, studying both as if in constant disbelief. "Everybody wants to have a connection [to Bernardo and

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102. Catherine Dunphy, *Can Paul Bernardo Get a Fair Trial*, TORONTO STAR, Feb. 20, 1993, at D1.

103. *Id.*

104. *Id.*

his wife]," she said yesterday. "It's really strange, like an obsession."<sup>105</sup>

Incredibly, *Star* editorial-board member Harold Levy even took the police to task for holding dramatic press conferences to announce the arrest of a suspect in high-profile cases:

The words themselves may not specifically suggest that the police believe their suspect is guilty.

But the overall impression to the viewer is that the suspect is drenched with guilt.

After all, why would they be holding such a mega-news conference if this wasn't "the man?"

Why would the senior officers be commending their troops for their thorough investigation?

Why would they be alluding to certain pieces of evidence that seem so conclusive, without giving any real details because they say they don't want to prejudice the suspect's right to a fair trial?

And why are they holding the news conference at all? The information they wish to share can surely be communicated through a standard news release.

What other reason could there be than to convict the accused before the trial by creating an overwhelming impression of guilt outside of the courtroom walls? . . . There is no room for such abusive practices in a justice system that treasures the presumption of innocence, and the right to a fair trial before a jury of one's peers.<sup>106</sup>

In reaction to the relentless media interest, the Ontario Attorney General's office delivered a letter to the Beamsville offices of the "Project Green Ribbon" task force<sup>107</sup> ordering a news blackout, just hours before chief investigator Bevan held a press conference to tell reporters that the regional police had asked the Metro police to delay Bernardo's arrest on the Scarborough charges for four days so they could complete their investigation in the Mahaffy-French murders.<sup>108</sup>

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105. Lisa Wright, *Ghosts Still Haunt St. Catharines*, TORONTO STAR, Feb. 21, 1993, at A6.

106. Harold Levy, *Police News Conferences Mock Right to Fair Trial*, TORONTO STAR, Feb. 22, 1993, at A17.

107. So named because students at Holy Cross Secondary School in St. Catharines wore green ribbons after the abduction of Kristen French. See Walter Stefaniuk, *Green: A Symbol of Hope*, TORONTO STAR, April 13, 1993, at A7.

108. Nick Pron & John Duncanson, *Police Forces at Odds Over Quick Arrest of Bernardo*, TORONTO STAR, Feb. 21, 1993, at A1.

Bevan also disclosed that a second suspect in the murders was being watched around the clock.<sup>109</sup>

The Attorney General's office was not talking. "Our position is that it's before the courts . . . we have no comment."<sup>110</sup> On February 22, however, after repeated requests from the media, Scarborough Crown Attorney Mary Hall released what the *Star* called "heavily censored" documents from the Ontario Court, Provincial Division, in Scarborough, detailing the forty-three sexual-assault and related charges against Bernardo.<sup>111</sup> The names of the victims and the dates of the attacks had been redacted from the documents, but the *Star's* story carried whatever grisly detail it found, including the suggestion from unnamed sources that police would reopen an investigation into the death of Tammy Homolka, Karla's sister.<sup>112</sup>

In the days that followed, the *Star* criticized police for their delay in obtaining forensic evidence,<sup>113</sup> for overlooking evidence connected with Bernardo's bankruptcy,<sup>114</sup> and for twice postponing formal charges in the Mahaffy-French murders.<sup>115</sup> It also covered the suspect's retention of a new lawyer, Kenneth Murray,<sup>116</sup> and the collection of evidence from the Bernardo home.<sup>117</sup> An editorial castigated Ontario Attorney General Marion Boyd for prejudging Bernardo's probable guilt by her public statements,<sup>118</sup> and letters to

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109. *Id.*

110. John Duncanson, *Task Force Scrambles to Build Case*, TORONTO STAR, Feb. 22, 1993, at A6 (quoting assistant deputy attorney general Michael Code's statement made on Feb. 21).

111. Philip Mascoll, *Bernardo Charges Date Back to 1983*, TORONTO STAR, Feb. 23, 1993, at A1.

112. *Id.* See also *supra* notes 85-86 and accompanying text.

113. Joseph Hall, *Metro Police Didn't Request Tests Till April, Officials Say*, TORONTO STAR, Feb. 24, 1993, at A7.

114. Kevin Donovan & Nick Pron, *Overlooked Bankruptcy Papers Could Hold Clues to Investigation*, TORONTO STAR, Feb. 25, 1993, at A11.

115. William Walker & Nick Pron, *Boyd Expects Charges Soon Against Bernardo*, TORONTO STAR, Feb. 24, 1993, at A1.

116. Peter Small, *Suspect Chooses Different Lawyer to Lead His Defense*, TORONTO STAR, Feb. 24, 1993, at A7.

117. John Duncanson & Jim Rankin, *Investigators Cart Boxes from House*, TORONTO STAR, Feb. 24, 1993, at A7. See also Michael Tenszen, *Painstaking House Search Under Way; Police Looking for Minute Traces of Hair, Fibres in Teens' Slayings*, TORONTO STAR, Feb. 26, 1993, at A4.

118. *Boyd's Blunder*, TORONTO STAR, Feb. 25, 1993, at A20.

the editor condemned both police<sup>119</sup> and media<sup>120</sup> behavior in the case.

For her part, Boyd expressed concern about the "high level of publicity prior to the laying of charges" in recent criminal cases.<sup>121</sup> "We all need to be very careful in these kinds of cases that we don't do anything to endanger the prosecution . . . [we] need to ensure that in every case the public's right to know is balanced with the rights of an alleged perpetrator."<sup>122</sup> Two days later, Boyd ordered a formal investigation into media coverage of the case to determine whether "any action should be taken."<sup>123</sup> Ontario Solicitor General David Christopherson followed up with a written warning to police forces across the province that officers would face stiff penalties for releasing confidential information in criminal investigations.<sup>124</sup>

Star columnist Don Sellar shot back in defense of the press, and of the judgment of prospective jurors.<sup>125</sup> Another column lamented the power of the provincial Centre for Forensic Sciences and the lack of regulation governing its operations.<sup>126</sup> A news story dug into the conflict between Metro and Niagara Region Police over the investigation and arrest,<sup>127</sup> and an editorial the following day denounced Boyd's investigation.<sup>128</sup> Little wonder that the newly appointed chief

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119. Keith W. Glead, *Police One-Upmanship Is Most Regrettable*, TORONTO STAR, Feb. 25, 1993, at A20. See also Christina Morgan, *Even the Appearance of a Fair Trial Seems Elusive*, TORONTO STAR, Feb. 27, 1993, at C3.

120. Nadia Liva, *Presumption of Innocence Obscured by Media Circus*, TORONTO STAR, Feb. 25, 1993, at A20. See also Gail Benjafield, *Story Is Bad Enough Without Sloppy Reporting*, TORONTO STAR, Feb. 27, 1993, at C3.

121. Kelly Toughill, *Boyd Flip-Flops on Exact Timing of Murder Charges Against Suspect*, TORONTO STAR, Feb. 25, 1993, at A11.

122. *Id.*

123. Kelly Toughill, *Attorney-General Orders Probe of Bernardo Media Coverage*, TORONTO STAR, Feb. 27, 1993, at A22. Reaction was predictably mixed:

"Somebody had to say stop, this has gotten completely out of hand," said Bill Trudell, vice-president of the Criminal Lawyers' Association of Ontario.

"If the police and the media can't discipline themselves, somebody has to put the brakes on," Trudell said.

Robert Fulford, a professor of journalism ethics at Ryerson Polytechnical Institute, said, "It's absurd to think there is any basis for legal action. It sounds like a smokescreen to take away from the police bungling on this case."

*Id.*

124. Nick Pron, *Police Warned of Penalties for Releasing Information*, TORONTO STAR, March 4, 1993, at A10.

125. Don Sellar, *Drawing a Line on Contempt*, TORONTO STAR, Feb. 27, 1993, at C2.

126. Donna Laframboise, *Forensic Centre Is a Law unto Itself*, TORONTO STAR, March 1, 1993, at A15.

127. John Duncanson, *Metro Force Wouldn't Wait for Niagara Investigation*, TORONTO STAR, March 1, 1993, at A8.

128. *Right To Know vs. Fair Trial*, TORONTO STAR, March 2, 1993, at A16.

of the Niagara Region Police, Grant Waddell, said he looked forward to building a better relationship with the media.<sup>129</sup> One of his first actions was to impose a news blackout in the case,<sup>130</sup> which he later defended as good for the police and the media. "The police are able to do their job," Waddell said, and "the public is not being inundated with stories."<sup>131</sup>

The blackout seemed to have an effect: news of the case was noticeably lighter during March. The lighter press coverage was apparently significant to Bernardo's attorneys. Following one of Bernardo's several brief court appearances, his lawyer, Kenneth Murray, said he was not planning to seek a change of venue if Bernardo went to trial in Toronto on the rape charges.<sup>132</sup> While he expressed some concern about publicity given the extended search of Bernardo's house,<sup>133</sup> Murray told reporters he was "confident that this jurisdiction and Toronto in general is sufficiently large to give him a fair trial at this point."<sup>134</sup> Murray said he thought Bernardo could get a fair trial "as long as we keep the publicity down and keep him tried in the courts and not in the press."<sup>135</sup>

If the newspapers seemed to be on their best behavior, behind-the-scenes action in other media was hot and heavy, with writers,

129. Nick Pron, *New Chief Aims for 'Rolls-Royce' Force*, TORONTO STAR, March 2, 1993, at A3.

130. Nick Pron, *Bernardo Charges May Take 'Few Weeks'*, TORONTO STAR, March 5, 1993, at A1.

131. *Chief Defends Bernardo Blackout*, TORONTO STAR, March 19, 1993, at A18.

132. Theresa Boyle, *Bernardo Wants Trial to Go Ahead in Metro*, TORONTO STAR, March 24, 1993, at A1.

133. Theresa Boyle, *Bernardo's Lawyer Wants Trial in Metro*, TORONTO STAR, March 25, 1993, at A26. See, e.g., *No Decision on Bernardo House Search*, TORONTO STAR, April 14, 1993, at E8; Nick Pron, *Barricades Down at Bernardo's Home*, TORONTO STAR, April 22, 1993, at A10; *House's Owners are Devastated*, TORONTO STAR, April 23, 1993, at A12; Nick Pron, *Police End Search in Home of Bernardo*, TORONTO STAR, April 30, 1993, at A1; Jim Rankin, *Police Use Generator at Bernardo's House*, TORONTO STAR, April 5, 1993, at A8.

134. Boyle, *supra* note 133, at A26.

135. *Id.* In late April, Ontario Attorney General Marion Boyd announced she would not seek contempt charges against the media for its coverage of the Bernardo case. Paul Moloney, *Boyd Won't Charge Media in Coverage of Bernardo Case*, TORONTO STAR, April 24, 1993, at A16. "In a letter to the Canadian Daily Newspapers Association, Boyd said [her] investigation [had] 'concluded that the public interest does not at this time require that any legal action be initiated.'" *Id.* Association president John Foy said he was pleased with the decision: "I think all good editors and reporters will be careful not to get involved in contempt of court. It's responsible journalism for every newspaper to make sure they don't go too far." *Id.* Columnist Don Sellar was not nearly so accommodating, lambasting Boyd for what he clearly believed was the use of a "veiled threat of legal action that could prevent journalists from doing jobs they're supposed to do in the public interest." Don Sellar, *Editorial, A-G Boyd Muddies the Waters*, TORONTO STAR, May 1, 1993, at D2.

agents, and publishers and producers all wheeling and dealing for book, television, and movie contracts.<sup>136</sup> One author suggested that paying top dollar for exclusive rights would be a waste of money: "Everything's going to come out in the trial. All you have to do is sit there and listen."<sup>137</sup>

The irony of that statement would soon become apparent. On May 18, police formally charged Paul Bernardo with first-degree murder in the Mahaffy and French killings.<sup>138</sup> But what really captured the media's attention were the manslaughter charges laid against Karla Homolka, Bernardo's estranged wife, who was charged the same day. The press learned for the first time that Homolka was the "second suspect" police had repeatedly discussed but never identified.<sup>139</sup> Homolka was freed on \$110,000 bail after a thirty-minute St. Catharines court appearance in which she waived her right to a preliminary hearing and elected a bench trial.<sup>140</sup> At the request of Homolka's lawyer, George Walker, who had been in negotiations with prosecutors for the past three months, the court banned any publication describing acts related to the killings as presented by Crown Attorney Murray Segal.<sup>141</sup>

The courtroom was filled with reporters, of course, and Walker took advantage of the opportunity to talk to them after the hearing.<sup>142</sup> Homolka had recently become suicidal and had undergone seven weeks of hospital treatment for depression, he said, adding, "The family has borne up quite well in spite of the constant attention on them."<sup>143</sup> Constant attention indeed. Quite apart from the media, more than seventy people gathered outside the courthouse to watch the family's arrival, creating a "circus atmosphere," and a steady stream of people drove or walked past the Homolka home during the day.<sup>144</sup> Following Homolka's court appearance on May 18, the press dredged up more biographical material on Homolka,<sup>145</sup> and Bernardo's brother,

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136. Susan Walker, *Bernardo Arrest Sparks TV, Film and Book War*, TORONTO STAR, April 24, 1993, at A1.

137. *Id.*

138. Cal Millar & Nick Pron, *Bernardo and Wife Charged in Slayings; Homolka Accused of Manslaughter in Mahaffy, French Cases*, TORONTO STAR, May 19, 1993, at A1.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. John Duncanson & Jim Rankin, *Dozens Seek Glimpse of Accused Woman*, TORONTO STAR, May 19, 1993, at A6.

145. John Duncanson & Nick Pron, *Homolka Was 'A Regular Kid'; As a Teenager, She Dreamed of Marrying Paul*, TORONTO STAR, May 19, 1993, at A7.



David, expressed sympathy for the Homolka family in the wake of a media "feeding frenzy."<sup>146</sup>

Adding to that frenzy, the Niagara police held a news conference on May 19 to celebrate the "most significant event in the history of the force."<sup>147</sup> The news blackout was over, but Bevan refused to answer any questions from the fifty or so reporters at the conference about the evidence in the case.<sup>148</sup> One such bit of evidence surfaced the next day, when the *Star* reported that police had received a tip implicating Paul Bernardo in the Scarborough rapes a month before Leslie Mahaffy was murdered.<sup>149</sup> As it recounted the many false leads that plagued the investigation, the story implied that the lack of communication between Metro and Niagara police unnecessarily prolonged the agony.<sup>150</sup> The story also carried a typical reaction from one Niagara policeman: "We worked our butts off, and all we got from the media was abuse. Maybe we were wrong on the Camaro, but we were just acting on information that we got from the public."<sup>151</sup> Metro police had no comment.<sup>152</sup>

Paul Bernardo's next court appearance in Toronto, on May 27, gave Murray a chance to express his concern about whether his client would get a fair trial.<sup>153</sup> "That's something we'll have to address when we take a look at all the material that has been published and how it impacts on the charges," he said.<sup>154</sup> Bernardo was in court to seek a delay in his arraignment because, Murray said, he still had not received all of the information that prosecutors had gathered.<sup>155</sup> Murray hoped to have it by June 7, when Homolka was scheduled to enter her plea on manslaughter charges.<sup>156</sup> That appearance was ultimately postponed until June 28, but Bernardo's defense team took

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146. Philip Mascoll, *Bernardo's Brother Warns of Media 'Feeding Frenzy,'* TORONTO STAR, May 19, 1993, at A6.

147. Cal Millar & Nick Pron, *Bernardo Faces Nine Charges in Slayings of 2 Teens,* TORONTO STAR, May 19, 1993, at A1.

148. *Id.*

149. Nick Pron, *Year-Long Delay Over Bernardo Tip,* TORONTO STAR, May 20, 1993, at A1.

150. *Id.*

151. *Id.*

152. John Duncanson, *Metro Police Mum on Role in Bernardo Investigation,* TORONTO STAR, May 21, 1993, at A7.

153. Cal Millar & John Duncanson, *Bernardo in Court to Delay His Plea,* TORONTO STAR, May 27, 1993, at A2.

154. *Id.*

155. *Id.*

156. *Id.*

the opportunity on June 7 to ask Justice Francis Kovacs for a ban on publicity.<sup>157</sup>

### C. Pretrial Proceedings

At the June 7 hearing in the Ontario Court of Justice, General Division, St. Catharines, Bernardo attorney Carolyn MacDonald moved for a ban on publication of the evidence to be presented at Homolka's trial on June 28 until after Bernardo's trial.<sup>158</sup> MacDonald urged the ban on the ground that release of the evidence could adversely affect her client's chance for a fair trial.<sup>159</sup> Homolka's lawyer, George Walker, said he would support such a ban, then raised the possibility that reporters be excluded from the courtroom altogether.<sup>160</sup> Walker said the issue was complicated by the proximity of Buffalo, N.Y., and it was reported that two Buffalo television stations whose signals are received in St. Catharines had said they would ignore any publication ban.<sup>161</sup> Crown Attorney Murray Segal said he would make the ministry's position known on the day of Homolka's trial.<sup>162</sup>

Reaction from the Canadian press was predictable. "The prospect of holding a secret trial for manslaughter then blaming the Americans is just silly," said Stuart Robertson, legal counsel to the Canadian Daily Newspaper Publishers' Association.<sup>163</sup> "This is something [that] clearly is terrifying to us all."<sup>164</sup> Buffalo journalists expressed frustration with the possibility of exclusion and said they would consider challenging it.<sup>165</sup> "We followed this case very closely, over a long period of time," said Steven Van Vliet, news director at WKBW-TV.<sup>166</sup> "This is fairly close to home. . . . Not [to] be allowed to report on a court situation that's in the interests of the public—we're not used to that."<sup>167</sup>

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157. *Homolka Remanded to June 28*, TORONTO STAR, June 7, 1993, at A1.

158. Nick Pron & Cal Millar, *Lawyer Seeks Publication Ban in Homolka Manslaughter Trial*, TORONTO STAR, June 8, 1993, at A2; see also Nick Pron, *Star Joins Globe to Fight Court Ban*, TORONTO STAR, June 22, 1993, at A2.

159. Pron & Millar, *supra* note 158, at A2.

160. *Id.*

161. *Id.*

162. *Id.*; see also John Duncanson & Nick Pron, *Homolka's Trial Draws Media Throng*, TORONTO STAR, June 28, 1993, at A1.

163. Tracey Tyler, *Ban Looms Over Homolka Trial; Media, Public Could Be Barred from Courtroom*, TORONTO STAR, June 21, 1993, at A2.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

On June 21, attorneys for the *Star* and the *Toronto Globe and Mail* jointly filed a nine-page brief opposing the anticipated exclusion, arguing that "Any order limiting public access . . . is an infringement of the constitutional rights' of the two newspapers."<sup>168</sup> Said *Star* editor John Honderich, "Our prime concern is that the courtroom be open to reporters to be able to tell, at some point, how this high-profile and unusual case was handled."<sup>169</sup> A *Star* editorial on June 24 called the publication ban proposed by Bernardo's lawyers a "reasonable position," that balanced Bernardo's right to a fair trial with the public's right to know.<sup>170</sup> But the editorial decried the "drastic and dangerous step of barring reporters from the trial altogether or preventing them from seeing the evidence" out of concern that American journalists would disregard the publication ban.<sup>171</sup> "Justice cannot be done in secret."<sup>172</sup>

That same day, Bernardo attorney Kenneth Murray withdrew his motion to suppress news coverage of the Homolka manslaughter trial.<sup>173</sup> In a press release, Murray said he dropped his request after meeting the prosecution team, but gave no reason for changing his position.<sup>174</sup> "As a result of reconsideration of our position, we wish to advise that [Bernardo's] application for a ban on publication . . . has been withdrawn," the release said.<sup>175</sup>

On the day of Homolka's trial, reporters and photographers from Canada and the United States descended on St. Catharines to cover the trial.<sup>176</sup> Some sixty reporters and sketch artists were allowed in the courtroom, along with at least six media lawyers who were prepared to oppose any request from the Crown for a publication ban.<sup>177</sup> Crown Attorney Murray Segal lost no time obliging them, telling the court

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168. Nick Pron, *Star Joins Globe to Fight Court Ban*, TORONTO STAR, June 22, 1993, at A2.

169. *Id.*

170. *A Witness to Justice*, TORONTO STAR, June 24, 1993, at A30.

171. *Id.*

172. *Id.*

173. Nick Pron & John Duncanson, *Bernardo Lawyer Drops Bid for Ban*, TORONTO STAR, June 25, 1993, at A1. According to the story, Homolka's lawyer, George Walker, endorsed Murray's change of heart. Whether that was true at the time is unclear; Walker ultimately supported the publication ban. See *infra* text accompanying notes 355-56.

174. Pron & Duncanson, *supra* note 173, at A1.

175. *Id.*

176. John Duncanson & Nick Pron, *Homolka's Trial Draws Media Throng*, TORONTO STAR, June 28, 1993, at A1.

177. *Id.*; Cal Millar & John Duncanson, *Crown Seeks Publication Ban in Karla's Trial*, TORONTO STAR, June 28, 1993, at A1.

that disclosure of evidence could prejudice Paul Bernardo's trial.<sup>178</sup> "The [C]rown has a significant role in maintaining the integrity of the court process and assuring that the administration of justice is properly served," Segal said.<sup>179</sup> "It [is] the intention of the [C]rown to seek a ban on the trial proceedings involving Karla Homolka until the conclusion of Paul Bernardo's trials."<sup>180</sup> Segal said he was not necessarily seeking to exclude the media or the public from the trial, except when "'sensitive evidence' could have a harmful psychological [e]ffect" on the victims' families,<sup>181</sup> but he left the details up to the court. At one point, Segal suggested that pool reporting could be used to make sure that the ban was not broken by American media.<sup>182</sup>

Bernardo's defense team vigorously opposed Segal's motion to seek a ban on publicizing trial proceedings. Bernardo's lawyers argued to the court that the public has a right to know the "details, if any, of Homolka's involvement" in the killings and the "truth of any 'deal' she made with the [C]rown."<sup>183</sup> Pointing out that the defense had not yet received information on the killings from the Crown, Bernardo's attorney Timothy Breen said that, in the absence of any facts, a ban would shield Homolka from any discussion of her involvement.<sup>184</sup> "If in fact this woman is going to be a witness, I think it's important that when she reaches the witness box, people know the truth about the deal she made."<sup>185</sup> Breen argued,

They're trying to send [Bernardo] to jail for the rest of his life, yet presuming to speak in his defence of the right to a fair trial. I appreciate my friend's concern on my client's right to a fair trial, but my response is "thanks, but no thanks." Given the possibility that there is a negotiated settlement, a ban would lead to a misleading impression of the case. The impression is that following his arrest, [Bernardo] is depicted as the principal . . . and his wife is seen as assisting the crown. If there is a ban, what you will continue to have is the same perception in the newspapers that he is the principal.<sup>186</sup>

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178. Millar & Duncanson, *supra* note 177, at A1.

179. *Id.*

180. *Id.*

181. *Id.*

182. Nick Pron, *Tell Us Karla's 'Deal,' Lawyer Insists*, TORONTO STAR, June 29, 1993, at

A1.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

When the arguments continued the following day, Breen charged that the "[p]olice have 'manipulated the press to advance their case'" against Bernardo by making Homolka out to be a victim.<sup>187</sup> Breen told the court that the police leaks and the press conferences following Bernardo's arrest "undermined" the Homolka prosecution's request for a publication ban.<sup>188</sup>

Homolka's lawyer, George Walker, argued in rebuttal that the press had not acted responsibly since Bernardo's arrest in February.<sup>189</sup> Walker appealed to Justice Kovacs "as a 'member of the Niagara community'" to impose the ban and prevent the case from becoming a "'trial by media.'"<sup>190</sup>

Media lawyers disagreed: "It makes no legal sense, no common sense. It's an absurdity," Bert Bruser, who represented the *Star*, told the court.<sup>191</sup> "The whole foundation of the system of justice is that trials be held in public," Bruser said, again focusing on the apparent deal between Homolka and the Crown.<sup>192</sup> "If there ever was a case that the public has to know what's going on—this is that case. The only ones asking for the ban are the people who made the deal."<sup>193</sup>

After hearing more arguments from media lawyers, and a final rebuttal from Segal, Justice Kovacs said he needed to study the briefs and told lawyers to appear on July 5.<sup>194</sup> "If there is a ban, and I stress 'if,' you should be present to discuss the terms of the ban."<sup>195</sup>

When court convened on July 5, Canadian and American media lawyers were in attendance, as well as attorneys for the Crown, Homolka, and Bernardo.<sup>196</sup> Justice Kovacs announced his intention to consider the Crown's application for a "time-limited ban" on the publication of the proceedings in the trial of Karla Homolka until the

187. John Duncanson & Nick Pron, *Bernardo Lawyer Hits Out at Police*, TORONTO STAR, June 29, 1993, at A1.

188. *Id.*

189. Nick Pron & John Duncanson, *Homolka Press Ban 'Absurd,' Trial Told*, TORONTO STAR, June 30, 1993, at A1.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Nick Pron & John Duncanson, *Ruling Monday on Homolka Ban*, TORONTO STAR, July 1, 1993, at A1.

195. *Id.*

196. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, para. 1 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>. The media companies represented were The Toronto Star, Thompson Publications, the Canadian Broadcasting Company, The Toronto Sun, and the Buffalo News, as well as independent author Stephen Williams. *Id.*

completion of Paul Bernardo's trial.<sup>197</sup> Following an exhaustive legal analysis, Justice Kovacs pronounced himself satisfied that there were exceptional and extraordinarily compelling circumstances in this case that required him to impose a temporary and partial ban on publication of the trial proceedings.<sup>198</sup> "I believe that the considerations for a fair trial outweigh the right to freedom of the press in these exceptional circumstances," he said.<sup>199</sup>

Of particular concern to Justice Kovacs, not unjustified it turns out, was the interest and proximity of the American media, which would not be subject to any order of his court unless they voluntarily submitted to its jurisdiction.<sup>200</sup> Comparing the different legal traditions of the United States and Canada,<sup>201</sup> Justice Kovacs found there would be little or no efficacy in any publication ban if the courtroom were open to American reporters.<sup>202</sup> He also found that nothing could prevent the American media from having a "source" in the courtroom, Canadian or otherwise, if the general public had access.<sup>203</sup>

Accordingly, Justice Kovacs admitted only accredited Canadian journalists, the families of victims and the accused, counsel for

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197. *Id.*

198. *Id.* at paras. 132-33. Specifically: (1) widespread, massive, and repetitive publicity that will no doubt continue, possibly reaching the "dew point" of whether an impartial jury can be selected; (2) the evidence read in at the Homolka trial is not evidence against Bernardo, but arises from the same factual situation, and should not be publicized; (3) inferences may be drawn improperly from the fact that Homolka and Bernardo lived together as man and wife; (4) the court has no jurisdiction over the American media, which has given broad coverage to the trial; and (5) the charges against Bernardo are extraordinarily serious and numerous. *Id.*

199. *Id.* at para. 134.

200. *Id.* at paras. 112-13. Justice Kovacs noted the case of *R. v. Banville* [1982] 69 C.C.C.2d 520, *appeal dismissed*, [1983] 3 C.C.C.3d 312 (N.B.Q.B.), involving a reporter for the *Bangor Daily News* (Maine) whose beat included the border communities of Edmunston, New Brunswick, and Madawaska, Maine. *Id.* The accused reported news that was subsequently distributed in Canada contrary to a publication ban. *Id.* At the contempt trial of the accused, who attorned to the jurisdiction, the court held that it had both personal and subject matter jurisdiction, notwithstanding the fact that the story was written in Maine and the newspaper published in Maine. *Id.*

201. *Bernardo*, No. 125/93, O.J. No. 2047, at paras. 115-17 (quoting extensively from *Re Global Communications Ltd. & A.G. Can.* [1984] 10 C.C.C.3d 97, 110 (Ont. C.A.)). In that decision, Thorson, J., pointed out that the process of jury selection in Canada is neither as prolonged nor as exhaustive as in the United States and that sequestration is exceptional in Canada: "The strong bias of our system is to prevent the dissemination before the conclusion of the trial of media publicity that might be prejudicial to the accused's fair trial." *Id.*

202. *Bernardo*, No. 125/93, O.J. No. 2047, at para. 118.

203. *Id.* at para. 119. For a thorough discussion on this point, see Tammy Joe Evans, *Comment: Fair Trial vs. Free Speech: Canadian Publication Bans versus the United States Media*, 2 Sw. J.L. & TRADE AM. 203 (1995).

Bernardo, three police officers, and his law clerk.<sup>204</sup> Foreign media were excluded from the courtroom, and no one was permitted to publish the circumstances of any deaths mentioned during the trial.<sup>205</sup>

Justice Kovacs said the press could publish the content of the indictment; whether there was a joint submission as to sentence; whether a conviction was registered, but not the plea; and the sentence imposed.<sup>206</sup> It could also report that part of the court's reasoning that pertained only to prosecutorial discretion in sentencing, the principles of sentencing the court applied, and remarks of the court in passing sentence on the issue of whether Homolka was a danger to the public, although the press could not report the psychiatric evidence on the issue of dangerousness.<sup>207</sup> The publication ban was in force only until completion of Bernardo's trial on the two first-degree murder counts.<sup>208</sup>

#### D. Trial and Sentence

After two days of argument about the media ban, the trial was a very brief affair. Karla Homolka's indictment was read out in open court on July 6, the day after Justice Kovacs announced the media ban.<sup>209</sup> As reported by the *Star*, it said little more than "'on or about the 14th day of June 1991 and the 29th day of June 1991' the accused 'did unlawfully kill Leslie Erin Mahaffy and thereby commit manslaughter'" and that "'on or about the 16th day of April 1992 and the 30th day of April 1992' the accused 'did unlawfully kill Kristen Dawn French and thereby commit manslaughter.'" <sup>210</sup> Homolka pleaded guilty to the charges, although the *Star* refrained from publishing that fact in compliance with the judicial ban.<sup>211</sup> The Canadian Press (CP) wire service did reveal her plea that night in what it later called a "mistake."<sup>212</sup> Forty-four minutes later, CP issued a "kill bulletin" to retract the story, but it had already been sent to as

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204. *Bernardo*, No. 125/93, O.J. No. 2047, at para. 137.

205. *Id.* at para. 140.

206. *Id.* at para. 141.

207. *Id.* at paras. 141, 144.

208. *Id.* at para. 144.

209. John Duncanson & Nick Pron, *Homolka Enters Plea; Families of Slain Girls in Tears*, TORONTO STAR, July 6, 1993, at A1.

210. *Id.*

211. *Id.*

212. *Wire Service Blows Ban Reveals Homolka Plea*, TORONTO STAR, July 7, 1993, at A18.

many as 14,000 newspapers and broadcasters around the world, including *The Buffalo News (News)*.<sup>213</sup>

The *News* reported the plea on page 1, saying Homolka "apparently pleaded guilty" as part of a "plea deal struck with the prosecution" for which "she is expected to testify against her estranged husband."<sup>214</sup> Explained managing editor Foster Spencer, "We weren't under any court order not to publish that stuff—we're a foreign paper. . . . I think we'd publish more if we could get some more information."<sup>215</sup>

For twenty-five minutes following the plea, Crown Attorney Murray Segal read a statement of the facts in the two murders.<sup>216</sup> The *Star* did not report even that statement, but referred to "what was said in court yesterday about the role Homolka played in the killing" as "shocking revelations" that visibly moved even reporters and some court officials to tears.<sup>217</sup> The *News* quoted Canadian reporters calling the litany "gruesome," "gut-wrenching," and "devastating."<sup>218</sup> "It was pretty emotional. A lot of people in this city would be very upset to hear what went on. . . . Everyone was bawling. Everyone."<sup>219</sup> There were more tears when the mothers of the slain teenagers read victim impact statements.<sup>220</sup>

A joint submission by Segal and Homolka's lawyer, George Walker, asked Justice Kovacs to impose a sentence of twelve years on each manslaughter charge, with the sentences to run concurrently.<sup>221</sup> Under Canadian law, Homolka would be eligible for parole in four years or she could apply to transfer to a halfway house in three-and-a-half years.<sup>222</sup>

In recommending sentence, Justice Kovacs said, the Crown had quite properly considered the assistance that Homolka had and would

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213. *Id.*

214. Tom Buckham, *Karla Teale Sent to Prison for 12 Years in Slaying of 2 Ontario Teen-Age Girls*, BUFFALO NEWS, July 7, 1993, at A1.

215. Jim Wilkes, *Buffalo Newspaper Ignores Ban on Plea*, TORONTO STAR, July 7, 1993, at A8.

216. Anne Swardson, *Unspeakable Crimes: This Story Can't Be Told in Canada. And So All Canada Is Talking About It*, WASH. POST, Nov. 23, 1993, at B1.

217. Joseph Hall, *Affluent Appearance Hid Face of a Killer*, TORONTO STAR, July 7, 1993, at A18.

218. Buckham, *supra* note 214, at A1.

219. *Id.*

220. *Id.*

221. Nick Pron & John Duncanson, *Homolka Gets 12 Years*, TORONTO STAR, July 7, 1993, at A1.

222. *Id.*



render in the prosecution of the Mahaffy and French murders.<sup>223</sup> The Crown also considered that Homolka gave information to police that would not otherwise have been known, that she did not personally inflict the deaths, and that the public interest called for laying the charges of manslaughter.<sup>224</sup> Pointing out that Section 236 of the Criminal Code provided a maximum sentence of life imprisonment for manslaughter, Justice Kovacs said the maximum sentence was reserved for the worst offense committed by the worst offender.<sup>225</sup> "This accused has committed the worst crimes. However, she is not the worst offender. . . ." <sup>226</sup> He noted that she had no previous criminal record, that she cooperated with police, and that she obviated a trial by her plea, thus avoiding additional trauma for the victims' families.<sup>227</sup>

Thus, Justice Kovacs continued, the maximum sentence is not appropriate to this case.<sup>228</sup> Instead, he cited four principles that would govern his sentencing: (1) the need to deter others in the community from acts of violence, (2) the opportunity to rehabilitate the individual accused, (3) the need to deter the accused, and (4) the pain the accused has inflicted upon her victims and their families.<sup>229</sup> While he insisted the recommended sentence would satisfy the first three, it was clear that he believed the fourth must give way to the practical value of Homolka bringing in Bernardo, never named, to justice:<sup>230</sup>

I keenly appreciate the community must be satisfied the sentence reflects the necessity for the protection and safety of the community. In this case, no sentence that I could impose would adequately reflect the revulsion of the community against the accused for the death of two completely innocent young girls, who both had lived their young lives beyond reproach in the eyes of their communities. I am keenly aware of all of that as well. I understand the righteous outrage which the community feels, quite properly so, and it is the court's responsibility to be objective and to consider the very special circumstances of this case and this accused.

There are serious unsolved crimes here and elsewhere. There can be no room for error in the successful prosecution of the

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223. *Judge Explains Why He Gave 12-Year Term for Slayings*, TORONTO STAR, July 7, 1993, at A18.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

offender for the safety of the community, whoever that offender may be, and I ask that no inferences be drawn from my remarks in that instance. The courts have held repeatedly that an appropriate consideration in the principles of sentencing is the cooperation that an accused gives to the police and to the prosecution.<sup>231</sup>

Justice Kovacs accepted the joint recommendation and sentenced Homolka to serve two twelve-year sentences concurrently.<sup>232</sup> Homolka was taken to Kingston's Prison for Women, a federal facility housing about 100 inmates in various degrees of security.<sup>233</sup>

### *E. Defiance and Enforcement*

#### 1. Public and Media Reaction

Public reaction to the gag order was mixed. The *Star* interviewed a number of St. Catharines residents, who variously expressed outrage and suspicion or understanding and support.<sup>234</sup> Reaction among Ontario lawyers interviewed by the *Star* was also divided, one calling it "completely unfounded and disturbing," another "drastic [but] not surprising."<sup>235</sup>

Interviews with the American media, while uniformly negative toward the gag order, revealed mixed attitudes toward compliance.<sup>236</sup> A *News* reporter said his paper would try to cover the proceedings as well as it could,<sup>237</sup> as did one television reporter.<sup>238</sup> Other broad-

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231. *Id.*

232. *Id.*

233. Kelly Toughill & Derek Ferguson, *Minister Backs Homolka Judge*, *TORONTO STAR*, July 7, 1993, at A1.

234. Jim Rankin, *Residents Angry at Lockout of Public*, *TORONTO STAR*, July 6, 1993, at A9. "Like, how many people charged with manslaughter get the kind of treatment [Homolka] is getting? She's not taken into court in a regular manner; she's not brought in handcuffs. The community wants to know why," said one interviewee. "I think it's excellent. We don't need to hear the details. I think everybody's aware of what's happened. It's just a matter of what's printed or not," said another. *Id.*

235. Tracey Tyler, *Lawyers Divided Over Sweeping Publication Ban*, *TORONTO STAR*, July 6, 1993, at A8.

236. Antonia Zerbisias, *Buffalo Media 'Perplexed' by Ruling*, *TORONTO STAR*, July 6, 1993, at A8.

237. *Id.*

"It's a cold and lonely feeling," *Buffalo News* reporter Tom Buckham said. "But what can you do? It's something I haven't experienced in all my years as a reporter. The fact that we're not allowed in is a story in itself, but we're going to try to cover the proceedings as best we can," he said.

*Id.*

238. *Id.* WGRZ television reporter Carol Kaplan told CBC-TV News that "journalists have a million and one ways to get information," suggesting her station might not respect the judge's decision. Later, during her own news report, Kaplan said the U.S. media are "already

casters said they had intended to comply with any restrictions on publication, to be a "good neighbor," but could not be sure how they would play the story in light of the ban.<sup>239</sup>

The Canadian media were also divided. *Toronto Globe and Mail* editor-in-chief William Thorsell said his paper would appeal the ruling, while *Toronto Star* editor John Honderich said his would live with it.<sup>240</sup> Ian Donaldson, general news editor at the CP wire service, said, "The way I feel, no matter how well-intentioned the judge may be . . . every time Canadian courts make a ruling like this it has the appearance of chipping away at [respect for] our own court system."<sup>241</sup>

Once the sentence was learned, public reaction was immediate and harsh. As Justice Kovacs left the courthouse less than an hour after sentencing, he was surrounded by about fifty angry protesters who booed and insulted the mild-mannered jurist for imposing such a light

thinking of ways to circumvent" the bans while "the Canadian media jokingly offered information about the trial at a price." *Id.*

239. *Id.*

"We're a little shocked," said WIVB news director Kirk Varner, adding he was "perplexed at this belief that Americans can't be trusted."

"My impression is that the judge saw us as potentially being in the wrong because we could be there, listen to the testimony, drive across the border and report it freely," said Varner, who wasn't sure last night how WIVB would play the story from now on. He did say the station had every intention of acting like "a good neighbor." But, he added, he's heard "speculation that some media organizations not this one might try to talk to people inside the courtroom and report it as 'sources in the court said blah-blah-blah.'"

WKBW's news director Steve VanVliet presented an affidavit to the judge yesterday morning promising to respect a publicity ban. But later, VanVliet refused to tell reporters outside the court whether he would keep his word. "Anything's a possibility," he said.

*Id.*

240. *Id.*

*The Globe and Mail* will appeal the ruling, said William Thorsell, editor-in-chief. "We've taken the view over the last several years that bans on coverage are not in the interests of justice," he said last night. Thorsell said in the view of his newspaper, Canadians can have a fair-minded approach to the trial despite the intense publicity that has preceded it. *Toronto Star* editor John Honderich said he was not surprised by the ruling but said the paper won't appeal the decision. "The important principle was to make sure the Canadian media was present for the entire trial. That has been achieved," he said. The *Star* is going to be restricted in what "we can say but the limitations will allow us to outline the bare details," Honderich said. "I would have preferred open reporting but the important principle is we will be there and can tell the full story at a later point."

*Id.*

241. *Id.*

sentence.<sup>242</sup> Attorney General Marion Boyd defended the judge and the sentence, suggesting that it was the media, not the public, that was truly outraged.<sup>243</sup> "I don't think people understand very well how the justice system operates . . . [h]ow important it is that we understand that cases are judged on the basis of the facts that are brought forward in court, not all the rumors or all the emotions that run but the facts," she told reporters.<sup>244</sup>

On July 9, the *Star* told its readers that it would appeal the publication ban after all.<sup>245</sup> The paper changed its position, an editorial said, because Bernardo's lawyer opposed the ban, because the ban would be impossible to police or guarantee, and because the publication ban precluded public debate of what went on at the trial.<sup>246</sup> Along with The Toronto Sun Publishing Corp. and Thomson Newspapers Co., Ltd. (publisher of *The Toronto Globe and Mail*), Toronto Star Newspapers Ltd. filed a notice of appeal in the Ontario Court of Appeal that same day.<sup>247</sup> The Canadian Broadcasting Corp. and Bernardo's defense counsel, Kenneth Murray, also said they would appeal the publication ban.<sup>248</sup>

The *Star* took pains to refute rumors that U.S. reporters had been trying to pry trial details out of Canadian reporters, although it confirmed that the U.S. tabloid television program *A Current Affair* was pursuing the story.<sup>249</sup> That program would air on October 28, and its transcript would become one of the documents widely

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242. Jim Rankin, *Angry Crowd Boos Homolka Trial Judge*, TORONTO STAR, July 7, 1993, at A3. See also Jim Rankin, *Outrage in St. Catharines; 12-Year Sentence 'Just Not Fair,' Residents Say*, TORONTO STAR, July 8, 1993, at A4.

243. Kelly Toughill & Derek Ferguson, *Minister Backs Homolka Judge*, TORONTO STAR, July 7, 1993, at A1.

244. *Id.*

245. *Why The Star Will Appeal*, TORONTO STAR, July 9, 1993, at A26.

246. *Id.*

247. Tracey Tyler, *3 Papers Claim Ban Based on 'Errors,'* TORONTO STAR, July 10, 1993, at A8.

248. *Id.*

249. Antonia Zerbisias, *No Spilling of Beans to Barred U.S. Media*, TORONTO STAR, July 9, 1993, at A25. In fact, *The Buffalo News* provided relatively little coverage of the story immediately following the Homolka trial. A July 11 story was based largely on Canadian news reports, including the one cited in this footnote. Barry Brown, *Rumors Fly in Wake of Gag Order in Teale Trial; Reports Claim Efforts to Circumvent News Ban*, BUFFALO NEWS, July 11, 1993, available in LEXIS, NEWS Library, ARCNEWS File. The paper also carried stories on Paul Bernardo's prison treatment, Barry Brown, *Special Jail Cell is Constructed for Teale; Move is Aimed to Protect Him from Prisoners*, BUFFALO NEWS, July 18, 1993, at C3; and the exhumation of Tammy Homolka's body, *Body of Sister of Karla Teale is Exhumed*, BUFFALO NEWS, July 21, 1993, at B4.

circulated over computer-based telecommunications media.<sup>250</sup> Reports that another tabloid television program from the United States, *Inside Edition*, had sent a crew to Ontario prompted Ontario Attorney General Marion Boyd to note that there was little the provincial government could do about it.<sup>251</sup> "There's no extradition [for contempt of court] and that's a big problem for us," Boyd said.<sup>252</sup> Other lawyers suggested that cable television outlets and stations that distribute programs violating the ban could be prosecuted, but a spokesman for Rogers Cablesystems insisted that the company views itself only as "the carrier of information, irrespective of its content."<sup>253</sup>

Nosy American reporters and tabloid television crews were not the only media concerns arousing the Canadian government's ire in July. Reports that a California manufacturer of "True Crime" trading cards was considering a card based on Karla Homolka prompted a member of the Provincial Parliament to demand that all such cards be banned in Metro Toronto.<sup>254</sup> More seriously, the Ottawa satire and gossip magazine *Frank* was beginning to report rumors about the Homolka-Bernardo affair, some of which could even be verified.<sup>255</sup>

## 2. Defiance in Cyberspace

But the greatest threat to the publication ban was coming from another source altogether. Even as Chief Justice Charles Dubin of the Court of Appeal for Ontario was meeting with attorneys representing the Crown and publication ban opponents, who had moved for an

250. See *infra* notes 285-97 and accompanying text.

251. William Walker, *Can't Control U.S. TV on Homolka, Boyd Says*, TORONTO STAR, July 14, 1993, at A15.

252. *Id.* See Evans, *supra* note 203, at 220-21.

253. Tracey Tyler, *Cable Firms Could Be Charged; U.S. Shows May Violate Homolka Ban*, TORONTO STAR, July 15, 1993, at A10. Toronto media attorney Stuart Robertson noted that federal broadcast regulations precluded cable companies from censoring the signals they carry. He also said that cable companies could thus be put in a position of "double jeopardy" between criminal charges and regulatory sanctions by a U.S. programmer's decision to violate the Canadian restrictions. *Id.* See also *infra* note 326 and accompanying text.

254. 'Trading Card' May Feature Homolka, TORONTO STAR, July 17, 1993, at A8. Catherine Yronwode, editor-in-chief of *Eclipse Enterprise*, Forestville, Calif., told the *Star* in a telephone interview that she would "definitely" do a Homolka card if she could get all the data. *Id.*

255. For example, *Frank* scooped by three weeks a *Toronto Star* story on Homolka's "trolling for men at a Brampton-area bar" and picking up a secret lover while under police surveillance. See Nick Pron & John Duncanson, *Homolka's Secret Romance Secretly Watched*, TORONTO STAR, July 30, 1993, at A1; Don Sellar, *When Fact is Fogged by Rumor*, TORONTO STAR, Aug. 7, 1993, at B2. See also Antonia Zerbisias, *Let's Be Frank About Why We Read It*, TORONTO STAR, Aug. 27, 1993, at A21.

expedited hearing on their appeal,<sup>256</sup> purported details of the Homolka-Bernardo murders (many allegedly revealed at Homolka's trial) were making their way into "cyberspace."<sup>257</sup> According to the *Star*, a number of "Bernardo Billboards," electronic bulletin board systems, were started in mid-February following Bernardo's arrest.<sup>258</sup>

Many of those who carried on an electronic debate in the billboards were opposed to the ban, saying there was no way the law could suppress the facts of the case. "The current structure of justice doesn't fit with modern reality," said one user, adding that the information would eventually leak out. "In the information age, there is nothing anybody [can] do to stop the spread. We're talking about it in a real public forum, speculating on what evidence and motivations might have been," a computer user said in one exchange. One person posted a note that he or she was afraid to put certain information on the publicly accessible system because it came from "friends who have legal and indirect associations to the case." Another computer user, apparently worried her information was too graphic for small children, warned readers before she sent the details across the system.<sup>259</sup>

Of all the computer communications traffic concerning the Homolka-Bernardo affair, the most influential was carried by a newsgroup called <alt.fan.karla-homolka>.<sup>260</sup> The group was created

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256. Tracey Tyler, *Dubin Seeks Transcript of Reasons for Ban*, TORONTO STAR, July 22, 1993, at A5.

257. John Duncanson & Nick Pron, *Computer Links Break Trial Ban*, TORONTO STAR, July 31, 1993, at A1. The term "cyberspace" is usually credited to novelist William Gibson, whose now-classic *Neuromancer* (1984) envisioned the evolution of internetworked information transmission systems into something akin to a parallel universe. WILLIAM GIBSON, *NEUROMANCER 4* (Ace Books 1994) (1984). Gibson first used the term "cyberspace" in a 1982 short story entitled "Burning Chrome," later collected in a 1986 anthology of the same name. WILLIAM GIBSON, *BURNING CHROME* 168-91 (Ace Books 1987) (1986).

258. John Duncanson & Nick Pron, *Computer Links Break Trial Ban*, TORONTO STAR, July 31, 1993, at A1.

259. *Id.*

260. A newsgroup is, in effect, an address on the Internet where users interested in a particular topic can converse with other interested users by posting and reading messages in the form of text files. Newsgroups are similar to discussion groups and bulletin boards available on commercial computer networks. The Internet is an umbrella network of local and regional networks worldwide linked together via telecommunications and accessible to virtually anyone with a computer and modem. Although it originated within the United States government, principally the Department of Defense and the National Science Foundation, the Internet has grown far beyond those origins. Most important, it is largely self-regulated. While any constituent network or point of entry computer may establish its own rules, for example, determine what newsgroups may be carried, use of the Internet as a whole is governed more by a community ethic than by detailed regulations. For additional details, see, e.g., ED KROL, *THE WHOLE INTERNET: USER'S GUIDE & CATALOG* (1993).

by Justin Wells, a University of Waterloo student, in response to the media ban and placed in the "alt.fan" hierarchy as an ironic comment.<sup>261</sup> Among the earliest postings were rumors collected by Neal Parsons of Waterloo, known to the newsgroup as "Neal the Trial Ban-Breaker."<sup>262</sup> Parsons' rumors, some with general descriptions of sources, included allegations that Homolka knew Kristen French slightly and had lured French into Bernardo's car; that Homolka videotaped Bernardo's sexual torture of French; that Homolka supplied the chloroform used to drug her own sister and videotaped and participated in her sexual abuse; that a Waterloo woman had already been selected as Paul Bernardo's next victim; that Bernardo had scrubbed down his house with an acid solution; and that police confiscated video and physical evidence of bestiality at the house.<sup>263</sup>

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Because there are thousands of newsgroups on the Internet, each one is named hierarchically for convenient browsing. The first element in a newsgroup name reflects the broadest interest category. A newsgroup name beginning with "comp," for example, deals with computer science and related matters. A newsgroup that begins with "alt" will carry discussions from an "alternative" point of view. There are many newsgroups that begin with "alt.fan," from <alt.fan.beatles> to <alt.fan.frank-zappa>. *Id.*

By 1995, much of the on-line conversation was taking place on the "Teale-Tales Mailing List," established by "Abdul, the Electronic Gordon Domm," in December 1993. *See* discussion *infra* at note 261. In Internet parlance, a "mailing list" (alternately, discussion list or listserv) is similar to a newsgroup, except that participants formally "subscribe" to the list and all postings are forwarded to subscribers by e-mail. KROL, *supra*, at 120-21.

261. *The Paul Teale/Karla Homolka Frequently Asked Questions List (FAQ), Version 4.0*, (last modified Jan. 12, 1995) <<http://www.cs.indiana.edu/canada/karla.html>> [hereinafter FAQ 4.0] (on file with the *Seattle University Law Review*). As its name implies, a newsgroup FAQ is a list of commonly asked questions and their answers that is regularly updated by group regulars for new readers. Their purpose is to bring a new reader up to speed on the issues that have already been discussed at length and preserve the active dialog capacity for new contributions.

This FAQ first appeared in September 1993 and contained a brief history of the case and a dozen rumors. *Id.* It was extensively revised and expanded on Dec. 17, 1993 (Version 2.0), and updated and reedited on Feb. 1, 1994 (Version 2.1), March 30, 1994, (Version 2.2), and June 10, 1994 (Version 3.0). *Id.* The principal editor of the FAQ from December 1993 to March 1994 was known by the pseudonym "Lt. Starbuck" (the name of a character in a science fiction television series called "Battlestar Galactica"). *Id.* The last editor was "Abdul, the Electronic Gordon Domm." *Id.*

To preserve their anonymity, Lt. Starbuck and others who posted to <alt.fan.karla-homolka> used cutouts, specifically a computer based in Finland (anon.penet.fi) that stripped their postings of all identifying code before retransmitting it to the newsgroup. *See* *Finish TV Runs Story on Teale-Homolka* <<http://www.cs.indiana.edu/canada/fin.story>>. Later, Abdul communicated through another site, Illuminati On-line, based in Austin, Texas.

While the information contained in the FAQ pertaining to the murders and the Homolka trial is of questionable reliability, there is little reason to doubt its description of communication process. As of July 1997, the FAQ and many other documents cited in this article remained available on the World Wide Web at <<http://www.cs.indiana.edu/canada/karla.html>>.

262. FAQ 4.0, *supra* note 261. *See also* Antonia Zerbisias, *Let's Be Frank About Why We Read It*, TORONTO STAR, Aug. 27, 1993, at A21.

263. FAQ 4.0, *supra* note 261.

Additional rumors were posted by "Abdul, The Electronic Gordon Domm,"<sup>264</sup> including more details of alleged sexual torture and necrophilic acts, and by "Lt. Starbuck," linking Bernardo with other missing young women.<sup>265</sup> Other postings, variously attributed to friends of friends who had friends with access to the courtroom or the investigation, purported to link Bernardo to a Japanese "snuff" video market and claimed that Bernardo cut the tendons of both Kristen French and Leslie Mahaffy.<sup>266</sup>

But this newsgroup and others that dealt with the Homolka-Bernardo affair<sup>267</sup> were far more than just collections of rumors, although that may have been their only potentially illegal activity.<sup>268</sup> More important, perhaps, were the free-wheeling debates they carried about the publication ban itself. Participants included Canadians, Americans, Europeans, and others, ban defenders and opponents alike. Often, the debates focused on the fine points of Canadian criminal law and procedure, distinguishing it from the American constitutional tradition. Principal justifications offered for defying the publication ban included its unenforceability and ineffectiveness; its role in further sensationalizing the case, making fact and rumor indistinguishable and

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264. The real Gordon Domm, a retired Ontario Provincial Police officer, was arrested for violating the publication ban. See *infra* notes 298-305 and accompanying text.

265. FAQ 4.0, *supra* note 261.

266. *Id.* Canadian journalists who were present for the Homolka trial said the prosecution's case did not include allegations of videotaped torture and other gory details described in an information packet distributed over the Internet by a self-styled Canadian citizens coalition for a \$20 "contribution" to an apparently bogus Buffalo address. Tom Buckham, *Canadian Journalists Say Document Detailing Homolka Trial, Murders Is Hoax*, BUFFALO NEWS, April 12, 1994, available in LEXIS, NEWS Library, ARCNEWS File; *Group Lists Details of 2 Ontario Murders; Document is Posted on Electronic Mail Network to Protest Gag Order*, BUFFALO NEWS, April 9, 1994, at 1.

267. Among them were the following: <alt.censorship>, <alt.true-crime>, <alt.comp.acad-freedom.talk>, <alt.news.media>, <alt.pub-ban>, <alt.pub-ban.homolka>, <can.politics>, <can.general>, <ont.general>, <soc.culture.canada>, and <tor.general>.

268. It is unclear whether posting rumors about the Homolka trial to a newsgroup actually violated the publication ban at all. "It all depends on where their information is coming from," media attorney Stuart Robertson told the *Star*. "If it's not coming from the court, they're probably not breaking the law. You can't stop people from talking about this case." John Duncanson & Nick Pron, *Computer Links Break Trial Ban*, TORONTO STAR, July 31, 1993, at A1. Robertson's view was not universally held. Law professor Dan Stuart told *The Queen's* (Queen's University) *Journal* that the availability of the Homolka FAQ and similar materials through the University library was "clearly contrary" to the ban. "'There's always a possibility of a criminal charge, which requires proof of guilty knowledge,' Stuart said." Brock Martland, *Homolka-Teale Details Available at Queen's; Banned Info Available at Library, on Computer Network*, THE QUEEN'S JOURNAL, Jan. 18, 1994, at 1 (on file with the *Seattle University Law Review*).



attracting the attention of foreign news media; and its assumption that only ignorant citizens can be impartial jurors.<sup>269</sup>

### 3. Attempts at Enforcement

By early August, police had begun investigating various possible violations of the publication ban at the request of the Ontario Attorney General's office.<sup>270</sup> The suppression campaign picked up steam in September when the British *Sunday Mirror* (*Mirror*) printed information that, according to the *Star*, was covered by the publication ban.<sup>271</sup> Michael Code, an assistant deputy attorney general, said there were "lots of things that can be done" to stop distribution of the

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269. FAQ 4.0, *supra* note 261. Typical of the more serious discussions was a March 25, 1994, debate between an American named Jason Gull and Justin Wells, the Waterloo student who created <alt.fan.karla-homolka> as a lark but came to defend the publication ban, at least against those who condemned it for not comporting with American values.

[Gull:] You're trying to defend the Canadian legal system—great. But it [is] simply asinine to defend the Homolka/Teale media ban with some "you Imperialist Americans just don't understand our ways—but we've been doing things this way since before there was an America." Whoopee! SO, do you mean the Canadian legal system has been violating the rights of its citizens since before 1776? You're right. . . . The ban is not the result of the benevolent government's concern for [Teale] jurors. It's a result of the Canadian government's desire to work behind closed doors, to prevent Canadian citizens (and Americans as well) from finding out how the government—the Homolka/Teale prosecution in this case—actually works. . . .

[Wells:] What the . . . What are you talking about? The Canadian government had nothing to do with the media ban. It was imposed by a judge not a politician. There is no wish to work behind closed doors. On what are you basing your information. True the prosecution did want the ban, but not because they wanted to escape public scrutiny. They wanted the ban so that when Paul Teal[e]'s trial came about they would be able to find an impartial jury, and that Paul would not be able to get off on a technicality. . . .

(visited Mar. 25, 1994) <alt.fan.karla-homolka> (on file with the *Seattle University Law Review*).

That discussion was triggered by the revelation on the newsgroup that bookstores throughout Ontario were pulling the April 1994 issue of *WiReD* magazine from the shelves because of an article on the use of the Internet to defy the publication ban. The article, which was severely criticized ("flamed") for inaccuracies by newsgroup regulars, reported that Homolka had pleaded guilty, itself a violation of the ban. The Canadian distributor of *WiReD* reportedly issued a memo advising all bookstores to return the illegal issue for a full credit. Louis Rossetto of *WiReD* estimated the cost of recalling the illegal issue to be between U.S. \$50,000 and U.S. \$100,000.

*WiReD* appears to have published the statement that Homolka pleaded guilty in all innocence, probably because it wrongly surmised that the plea could not have been covered by the ban if the circumstances of conviction and sentence were not. For an interesting account of the *WiReD* episode, see K.K. Campbell, *A Walk on the Wired Side: U.S. Mag Fails to Grasp Finer Points of Homolka Press Ban*, *EYE WEEKLY* (Toronto), March 31, 1994 (visited Apr. 1, 1994) <alt.fan.karla-homolka> (on file with the *Seattle University Law Review*).

270. *Police Probe Stories About Homolka Trial*, *TORONTO STAR*, Aug. 11, 1993, at A4.

271. David Israelson, *U.K. Newspaper Snubs Ban on Homolka*, *TORONTO STAR*, Sept. 20, 1993, at A2.

paper in Canada if the information truly violated the ban.<sup>272</sup> Code also noted that anyone who published or sold a publication violating the ban would be subject to contempt charges.<sup>273</sup> The *Mirror's* distributor, Gordon and Gotch Periodicals of Concord, held back hundreds of copies of the September 19 issue until it could get a legal opinion, even as lines formed at Toronto bookstores waiting for the paper to be released.<sup>274</sup> When the Ontario Attorney General ordered the *Mirror* kept off newsstands, the company decided to destroy nearly 1,000 copies.<sup>275</sup>

Perhaps feeling threatened by the prospect of unregulated competition from foreign media and home-grown rebels, the mainstream Canadian media fought back as well as it could. The Association of Canadian Publishers weighed in with a condemnation of the ban as a "threat to rights of the Canadian people guaranteed by the Charter of Rights and Freedoms,"<sup>276</sup> and attorneys for the four media companies appealing the ban went back to Justice Kovacs's courtroom seeking a clarification of his order.<sup>277</sup> Specifically, the media wanted him to rule that their constitutional rights under the Charter conferred standing at the Homolka trial that would enable them to appeal the publication ban.<sup>278</sup> Crown counsel Murray Segal had argued that the Canadian media had no standing, although they were allowed to monitor the trial.<sup>279</sup> In a written ruling on October 22, Justice

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272. *Id.*

273. *Id.*

274. Nick Pron, *Tabloid's Karla Tale Is Kept Off Shelves*, TORONTO STAR, Sept. 21, 1993, at A2. The *Star* quoted Ken Keith, manager of a Toronto bookstore that carried the *Mirror*: "Not since the death of Elvis has there been this much public fervor over a story. . . . Quite clearly there's a large, unsatisfied demand out there for details." *Id.* An American tabloid, *The Globe*, also carried a story entitled "The Ghoul Next Door" as the center spread in its September issue. Promoted on the cover as "Canada's Most Shocking Killings; The Untold Story of an Unspeakable Crime," the *Globe* story featured color pictures of Homolka and Bernardo at their wedding, but the *Star's* story made no allegation that it carried information that violated the publication ban. *Id.*

275. *Article on Karla to be Shredded*, TORONTO STAR, Sept. 23, 1993, at A5. See also Tom Buckingham, *April 5 Hearing Date Set for Teale in Two Slayings*, BUFFALO NEWS, Sept. 29, 1993, at 16.

276. *Public Could Face Bernardo Hearing Ban*, TORONTO STAR, Sept. 16, 1993, at A2. The *Star* quoted association president Karl Siegler: "The justice system works best when there is full disclosure of information, not just rumors and speculation." *Id.*

277. Nick Pron, *Media Try to Clarify Homolka Evidence Ban*, TORONTO STAR, Sept. 24, 1993, at A10.

278. Leslie Papp & Nick Pron, *Homolka Trial TV Show Draws Boyd's Objections*, TORONTO STAR, Oct. 19, 1993, at A9.

279. *Id.* When the media filed their appeal of the ban, the Court of Appeal instructed them to go back to Justice Kovacs for a formal order outlining his reasons for the ban. When lawyers for the four companies complied, Segal presented his motion asserting that the media companies

Kovacs confirmed that the media had standing at Homolka's trial and thus the right to appeal his publication ban.<sup>280</sup> He noted that the Crown had not opposed standing for the media at trial, but only raised the issue after the trial.<sup>281</sup>

When Bernardo's preliminary hearing on the two murders was scheduled for April 5, 1994, the *Star* wishfully quoted one of Bernardo's lawyers saying the defense team would not seek a publication ban.<sup>282</sup> "'The public has an interest in hearing some of the things we anticipate will be said [in court],' Carolyn MacDonald told reporters. . . . 'Our position is he could get a fair trial if the evidence was made public.'"<sup>283</sup> Of course, Bernardo had opposed the ban in the first place, and the *Star* duly noted that it would be up to the Crown whether to seek a publication ban at the preliminary hearing.<sup>284</sup>

Outside the courtroom, attention had turned to the planned airing of *A Current Affair* with a segment purporting to carry details that were revealed at trial.<sup>285</sup> Attorney General Boyd let it be known that any Canadian cable operator who carried a program revealing such details would be subject to penalties: "'Our concern is to protect the integrity of the process. If that's breached in any way, it may affect our ability to guarantee a fair trial.'"<sup>286</sup> Later, she added that any violation would be "handled very, very severely."<sup>287</sup> A provincial

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lacked standing. Nick Pron, *Media Get Court's Go-Ahead to Fight Homolka News Ban*, TORONTO STAR, Oct. 23, 1993, at A17. The *Star* quoted Osgoode Hall law professor Alan Young calling the Crown's position virtually unprecedented. "'It seems to me like an attempt to stall [the appeal].'" Papp & Pron, *supra* note 278, at A9.

280. Pron, *supra* note 279, at A17.

281. *Id.*

282. Nick Pron, *Bernardo Preliminary Hearing Set; Estranged Wife to Testify for Crown*, TORONTO STAR, Sept. 29, 1993, at A10. Bernardo's preliminary hearing on the forty-eight rape-related charges in Scarborough was subsequently postponed until July 4, 1994, then abandoned altogether in favor of a direct indictment. Nick Pron, *Bernardo Hearing on Rapes Put Off to July 4*, TORONTO STAR, Oct. 4, 1993, at A2.

283. Pron, *supra* note 282, at A10.

284. *Id.*

285. Papp & Pron, *supra* note 278, at A9.

286. *Id.*

287. Leslie Papp, *Probe Urged as U.S. Show Does Story on Homolka*, TORONTO STAR, Oct. 20, 1993, at A14. Tape of the reporter's question and Boyd's complete quote became part of the program itself:

Reporter: Minister, you will be aware that an American show entitled "A Current Affair" will air a program about the deaths of Kristen French and Leslie Mahaffy. And the program will also deal in detail with the manslaughter trial of Karla Teale.

Boyd: We are monitoring very carefully what's going on and if, in fact, there is a breach, that will be handled very, very severely.

legislator charged that the program's producers "came into this province, willfully broke our laws, misrepresented themselves, and now may put in jeopardy a very important trial to Ontarians and Ontario victims. . . ."288 The mother of Leslie Mahaffy claimed she had been duped into an interview by the program's crew,<sup>289</sup> an allegation the program adamantly denied.<sup>290</sup>

As the October 28 air date drew closer, Fox Television said it would supply Canadian and U.S. border broadcasters with two versions of *A Current Affair*, one carrying the offending segment and one carrying a substitute.<sup>291</sup> At the same time, it hyped the "American version" as presenting a "mystery source" who would "tell all."<sup>292</sup> Toronto bar owners with satellite dishes also promoted the American version, but ultimately backed down, as did the U.S. border broadcasters.<sup>293</sup> Even so, a half-million Canadian satellite dish owners had access to the program in their own homes.<sup>294</sup>

The program itself featured little information about the Mahaffy and French murders that had not been publicly known before

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*A Current Affair: The Story the Canadian Government Doesn't Want You to See . . .* (television broadcast Oct. 26, 1993) [hereinafter *Transcript*] (transcript on file with the *Seattle University Law Review*). The transcript became one of the several key documents archived by the computer trial ban breakers and is available on the Internet at <<http://www.cs.indiana.edu/canada/CurrentAffair>>. (The date of the transcript, Oct. 26, is probably a mistake; the program aired on Oct. 28.)

288. Leslie Papp, *Probe Urged as U.S. Show Does Story on Homolka*, TORONTO STAR, Oct. 20, 1993, at A14 (quoting Progressive Conservative MPP Cam Jackson (Burlington South)). Jackson was far from satisfied with Boyd's response: "'So far, the extent of their contribution is to say, 'We're frustrated, and we're going to sit in front of a TV and wait.''" *Id.*

289. *Id.*

290. Leslie Papp, *Police Peruse List of Homolka Queries*, TORONTO STAR, Oct. 21, 1993, at A11. A press release issued by the program also denounced Jackson's accusations: "Contrary to Mr. Jackson's statements, we are not a bunch of foreigners who 'came to this province.' Every single member of our crew, including the reporter, Mary Garofalo, is a Canadian citizen." *Id.*

291. Greg Quill, *U.S. Border Stations May Air Banned Evidence from Trial*, TORONTO STAR, Oct. 23, 1993, at A17. "'The border stations have two options,'" said a Fox Television lawyer. *Id.* "'It's their decision [whether to air the program], not ours. We want to be as helpful to our U.S. broadcasters as possible. They are American stations and abide by U.S. law, not Canadian law. But we understand their predicament, which is why we made the substitute available.'" *Id.*

292. Nick Pron, *Show Touts Bernardo 'Revelations'*, TORONTO STAR, Oct. 27, 1993, at A13.

293. Nick Pron, *Defiant Metro Bar Managers Change Tune on Homolka Show*, TORONTO STAR, Oct. 29, 1993, at A5 [hereinafter Pron, *Defiant Metro Bar*]. The *Star* later reported that border stations were never sent the offending segment. Nick Pron, *Possible Breach of Homolka Ban Probed*, TORONTO STAR, Oct. 30, 1993, at A2 [hereinafter Pron, *Possible Breach*].

294. Pron, *Defiant Metro Bar*, *supra* note 293, at A5. Greg Walling, chairman of the Satellite Communications Association of Canada, said the technology made a mockery of the publication ban: "'The technology is available and if people decide to watch it they can't be stopped.'" Pron, *Possible Breach*, *supra* note 293, at A2.

Homolka's trial, but it did offer details of Tammy Homolka's death that paralleled those reported on the Internet by Neal Parsons.<sup>295</sup> It also included an interview with a man who purported to be Paul Bernardo's former cellmate and sex partner.<sup>296</sup> The following day, Attorney General Boyd warned that contempt charges could be laid against any Canadians who were found to have helped *A Current Affair* break the ban, including anyone circulating bootleg copies of the videotape.<sup>297</sup>

The reference was to a retired Ontario Provincial Police officer named Gordon Domm, a resident of Guelph, and head of a group called the Citizen's Coalition Favoring More Effective Criminal Sentences.<sup>298</sup> Domm began his personal war against the publication ban by circulating fifty copies of a bootleg videotape of the American version of *A Current Affair*.<sup>299</sup> Later, Domm vowed to distribute copies of the September 19 London *Sunday Mirror* article if the Ministry did not charge him with contempt of court first.<sup>300</sup> Domm was arrested on November 19 as he tried to mail 200 copies of the story to members of his coalition for tougher prison sentences, in full view of the television cameras,<sup>301</sup> but was released without charges while the Crown tried to figure out if he had broken the law.<sup>302</sup> "What we have done is try and act so that in fact we will not be closing the door after the horse has escaped," Attorney General Boyd told the legislature.<sup>303</sup> Domm was charged with two counts of contempt on December 2, and when appeared in court December 18 to answer them, he threatened to continue to violate the ban if he did

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295. Transcript, *supra* note 287. See also *supra* text accompanying notes 262-63. *A Current Affair* attributed those details to an anonymous telephone caller.

296. Transcript, *supra* note 287. On November 9, *A Current Affair* did a follow-up story, interviewing a childhood friend of Bernardo, who added little more than background to the story. Notes on the Nov. 9 show were appended to the October 26 transcript in <<http://www.cs.indiana.edu/canada/CurrentAffair>>.

297. Pron, *Possible Breach*, *supra* note 293, at A2.

298. *Id.*

299. Mark Bellis, *Former Officer Defies Order, Sends Out Tape of TV Show*, TORONTO STAR, Nov. 3, 1993, at A4.

300. Nick Pron, *Protester Vows to Distribute Banned Story*, TORONTO STAR, Nov. 11, 1993, at A9. The *Mirror* article, *Killer Ken and Barbie's Video of Horror*, by Tim Miles, is archived at <<http://www.cs.indiana.edu/canada/SundayMirror>>.

301. Mark Bellis, *Trial Ban Fighter Arrested: Retired Officer Battled Gag Order in Homolka Case*, TORONTO STAR, Nov. 20, 1993, at A17.

302. *Province Investigating Attempt to Distribute Homolka Article*, TORONTO STAR, Nov. 23, 1993, at A11.

303. *Id.*

not get an immediate trial.<sup>304</sup> A preliminary hearing was set for March 1994.<sup>305</sup>

#### 4. *Washington Post* Article

Even before Domm was charged, however, his story was eclipsed by the *Washington Post's* (*Post*) decision to carry a major story on the Homolka-Bernardo affair by Toronto-based correspondent Anne Swardson.<sup>306</sup> Of all the media covering the story to this point, the *Post* was by far the most prestigious. The story dominated the *Post* "Style" section on November 23 under the banner headline "Unspeakable Crimes," subtitled "This Story Can't Be Told in Canada. And So All Canada Is Talking About It."<sup>307</sup> The story was sourced to press reports and to "interviews with people knowledgeable about what was said in the courtroom."<sup>308</sup> Again, the story carried a detailed account of Tammy Homolka's death and Karla Homolka's participation in Kristen French's kidnapping.<sup>309</sup> It also asserted that, contrary to rumors, there was nothing said in the courtroom about Bernardo's making and selling "snuff" films.<sup>310</sup>

Within days, the *Star* was reporting that the *Buffalo News*<sup>311</sup> and the *Detroit News*<sup>312</sup> were considering reprinting the *Post* article. Asked if he would kill the story in some 25,000 copies sold in Canada, *Detroit News* deputy managing editor Frank Lovinski told the *Star*, "'I don't think you can [draw the line on censorship] once you start doing that. If you're going to censor this, then you'll censor that and the next thing.'"<sup>313</sup> The combined *Detroit Sunday News and Free Press*,

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304. Canadian Press (CP), *Library Defies Homolka Ban; Retired Guelph Police Officer Keeps Up Fight*, TORONTO STAR, Dec. 18, 1993, at A24; *Homolka Trial, Ban, A Running Story*, TORONTO STAR, Dec. 26, 1993, at F5.

305. Nick Pron, *Top Court Urged to Reject Appeal by Media of Homolka Trial Ban*, TORONTO STAR, Feb. 1, 1994, at A2. During the hearing on the publication ban appeal, on January 31, Domm distributed copies of a *Newsweek* article on the murders from the courthouse steps. *Id.*

306. Anne Swardson, *Unspeakable Crimes; This Story Can't Be Told in Canada And So All Canada Is Talking About It*, WASH. POST, Nov. 23, 1993, at B1. This article, too, has been archived in <<http://www.cs.indiana.edu/canada/WashingtonPost>>.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* See *supra* note 266 and accompanying text.

311. *Paper Ready To Run Homolka Trial Story*, TORONTO STAR, Nov. 25, 1993, at A32.

312. *U.S. Papers to Run Story on Homolka*, TORONTO STAR, Nov. 27, 1993, at A13.

313. Theresa Boyle, *U.S. Paper Changes Homolka Edition*, TORONTO STAR, Nov. 28, 1993, at A5. Managing editor Christina Bradford told the *Buffalo News*, "'To deprive our readers of a story to satisfy the Canadian government's laws does not make sense.'" Peter Simon, *Canadians Flock to U.S. for Details of Slayings; Ontario Officials Warn News to Respect Ban*, BUFFALO

which carried the story on its front page November 28, did offer the offending edition in Canada, but Canadian distributors refused to sell them or removed the front section to avoid arrest.<sup>314</sup>

The Buffalo paper also printed the story in its Sunday issue but not in the 4,000 copies usually distributed in Canada.<sup>315</sup> After Ontario officials warned they would confiscate the papers and bring legal action against distributors, a special press was set up to print a Canadian edition with a substitute story.<sup>316</sup> "We didn't want to get anybody into legal problems," said editor Murray B. Light.<sup>317</sup> In fact, *Buffalo News* delivery trucks were met at the border Sunday morning by twenty Canadian police officers who checked the bundles to make sure none of the papers carried the offending stories.<sup>318</sup>

As a consequence, many Canadians crossed the border that Sunday to buy some 3,000 unexpurgated copies of the *Buffalo News* from newsstands and convenience stores in Buffalo, Niagara Falls, and Lewiston.<sup>319</sup> On their return, Niagara Region police officers and Canadian customs inspectors detained anyone carrying more than one copy and confiscated the excess; by the end of the day, sixty-one people had been arrested or "spoken to" and 187 newspapers seized.<sup>320</sup> Said Staff Superintendent James Moody, "Our intent is

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NEWS, Nov. 29, 1993, at A1.

314. *Sunday's Paper Kept from Canadian Outlets*, DETROIT FREE PRESS, Nov. 29, 1993, at 5B; Simon, *supra* note 313, at A1; Nicholaas van Rijn, *U.S. Papers Seized Over Homolka Ban*, TORONTO STAR, Nov. 29, 1993, at A1.

315. Boyle, *supra* note 313, at A5; Simon, *supra* note 313, at A1.

316. Boyle, *supra* note 313, at A5.

317. Simon, *supra* note 313, at A1.

318. *Id.* The *Star* quoted a Canadian customs officer saying that no attempt was made to look for copies of the Detroit paper in the Windsor area, and no attempt was made to bring the paper across in "commercial quantities." van Rijn, *supra* note 314, at A1.

319. Simon, *supra* note 313, at 1. *Buffalo News* circulation director said the company sold more papers than ever before on Sunday, with stores near the border asking for extra copies. One man spent \$175 to buy 100 copies. van Rijn, *supra* note 314, at A1.

320. Simon, *supra* note 313, at A1. The *Buffalo News* carried this description of one detention:

Sheila MacDonald of Fort Erie, whose picture was in Sunday's News as her company's employee of the year, said authorities at the Peace Bridge confiscated three papers she and her sister, Lisa Pell, purchased in Buffalo. She said she was unaware of the ban until then.

"We went over to buy the paper because we couldn't get any over here," she said. "They put us in a room and a cop came and arrested us. He put his hand on my shoulder and told me to shut up, and then he put his hand on my sister's shoulder and read us our rights.

He took our names and our driver's licenses and took our papers. He let us keep my picture and the TV Topics. When he let us go, he said [the arrest] would show on the computer, but not as an indictable offense. It won't show up when we cross the border, but it would if we got pulled over in Fort Erie."

to prevent our citizens from committing an offense by breaking the ban, and to protect the right to [a] fair trial. It is not our intent to lock up half the region."<sup>321</sup>

With the reprinting of the *Post* article by the Buffalo and Detroit papers, and the spectacle of Canadians being arrested at the border and their newspapers confiscated, the U.S. media could hardly ignore the story any longer. Over the next few days, stories on the publication ban appeared in newspapers all over the country,<sup>322</sup> and *Newsweek* magazine devoted a full page to "The Barbie-Ken Murders" in all except its Canadian edition.<sup>323</sup> Cable News Network's *Larry King Live* featured a panel discussion on the case November 29, using a tape delay to allow Canadian carriers to delete audio portions of the

*Id.*

321. *Id.* The *Star* interviewed Niagara Region police Sergeant Cor Vandermeer, who said "police received instructions from the Ministry of the Attorney-General that people bringing the *Buffalo News* across were in possible breach of a publication ban." van Rijn, *supra* note 314, at A1. Vandermeer said customs officials did their "usual" inspections at the border, but referred anyone carrying more than one paper to a police officer standing nearby. *Id.* Police presumed that persons carrying only one copy were not bringing it in for the purpose of publication or distribution. Vandermeer said the arrests and seizures were made under Section 495(1a) of the Criminal Code, which permits police to arrest without a warrant any person an officer believes "has committed, or is about to commit an indictable offence." Criminal Code, R.S.C., ch. C-46, § 495(1a), (1985) (Can.); van Rijn, *supra* note 314, at A1. Vandermeer identified the violation in question as "disobeying an order of the court," per Section 127(1) of the Code. Criminal Code, R.S.C., ch. C-46, § 127(1), (1985) (Can.); van Rijn, *supra* note 314, at A1. Once the offending newspapers were seized, Section 503(1d) allowed police to release any person from custody without condition. Criminal Code, R.S.C., ch. C-46, § 503(1d), (1985) (Can.); van Rijn, *supra* note 314, at A1.

322. See, e.g., *Canada Bans U.S. Papers Over Story*, *NEWSDAY*, Nov. 29, 1993, at 19; *Canadian Ban Order Sparks U.S. Media Feeding Frenzy*, *PHOENIX GAZETTE*, Dec. 1, 1993, at B4; *Canadian Ban Restricts U.S. Papers*, *ST. PETERSBURG TIMES*, Nov. 29, 1993, at 5A; Carol J. Castaneda, *Canadian Trial Spawns Black Market for News*, *USA TODAY* (except in Canada), Nov. 30, 1993, at 9A; *Court Muzzle Ends at Border; Ontario Murders Spark U.S. Interest After Judge Bans Coverage*, *PLAIN DEALER* (Cleveland), Dec. 3, 1993, at 3C; *Papers Not Sold in Canada*, *SACRAMENTO BEE*, Nov. 29, 1993, at A12; *Police Confiscate Newspapers at Border*, *WASH. POST*, Nov. 30, 1993, at C3; Storer H. Rowley, *Angry Canada Blocking Unabridged U.S. News*, *CHI. TRIB.*, Dec. 2, 1993, at 1; Suzanne McGee, *U.S. News Media Scramble to Comply with Order in Canadian Murder Case*, *WALL ST. J.*, Dec. 3, 1993, at B5C; *U.S. Newspapers Restricted by Canada's Ban on Trial*, *ORLANDO SENTINEL*, Nov. 29, 1993, at A6. *The New York Times* covered the story on four consecutive days, from November 30 through December 2, when it reported that trucks carrying the previous day's *Times* were turned back at the border near Buffalo. *Officials Stop Trucks Loaded with The Times*, *N.Y. TIMES*, Dec. 2, 1993, at B6. Six hundred copies bound for Ottawa were sent back to the United States, the *Times* said, although 1,100 were allowed to enter near Montreal. *Id.* Copies of the national edition, which did not contain the offending story, were flown to Toronto. *Id.*

323. Russell Watson & Linda Kay, *The Barbie-Ken Murders*, *NEWSWEEK*, Dec. 6, 1993, at 36. While excluded from the Canadian edition of the magazine, it quickly became a staple on the Internet and is among the documents archived at <<http://www.cs.indiana.edu/canada/NewsWeek>>.



program that might violate the ban.<sup>324</sup> U.S. broadcasters, including ABC and NBC network news programs, began reporting details that had Canadian cable companies scurrying to block them out,<sup>325</sup> despite concern that such blocking might violate Canadian broadcast regulations.<sup>326</sup>

Incidents of defiance and enforcement became increasingly bizarre. University computer systems were purged of references to the Homolka trial.<sup>327</sup> A Buffalo disc jockey stood on the American side

324. Tom Buckham, *Publication Ban in Gruesome Murder Case Is a Bitter Pill for Canadian Journalists*, BUFFALO NEWS, Nov. 30, 1993, at A1.

325. *Id.* See also Charles Trueheart, *Murder Story Goes Over the Border*, WASH. POST, Dec. 3, 1993, at G4; Donovan Vincent, *Cable Services Block U.S. Items on Homolka Case*, TORONTO STAR, Nov. 30, 1993, at A8. The *Star* reported that Maclean-Hunter and Rogers Cablevision, two of Canada's largest cable companies, were continuously monitoring border stations and replacing anything related to the trial with a message saying the program was unavailable due to the publication ban. Canadians could still receive the U.S. broadcasts by antenna or satellite. Vincent, *supra*, at A8.

326. Barry Brown, *Blackouts of TV Spur Warning; Action May Conflict with Canadian Rule*, BUFFALO NEWS, Dec. 5, 1993, at B3. The *News* quoted Bill Allen, spokesman for the Canadian Radio, Television, and Telecommunications Commission: "Unless [the cable companies] have the commission's prior authorization, cable companies cannot alter or curtail signals they distribute." *Id.* Don Hinds, a Maclean-Hunter vice president, said his firm would "sooner obey the Ontario law and take our chance with the commission." *Id.*

327. On November 3, 1993, Raymond Benoit of Environment Canada reportedly sent a message to administrators on CA\*NET, a major Canadian backbone network, calling their attention to "a news discussion group called 'alt.fan.Karla-Homolka' related to the court case of the same name and for which we believe there is a Canada-wide publication ban." *FAQ 4.0*, *supra* note 261. As a result, many Canadian universities deleted the newsgroup at their local sites. *Id.*

On Nov. 30, Roger Watt of the University of Waterloo's Computing Services posted the following message:

I have just received the following from Dr. Johnny Wong, Associate Provost, Computing and Information Systems, with the request that I post it in appropriate newsgroups.

[Provost] Dr. Jim Kalbfleisch has ordered the removal of material about the trial of Karla Teale from the University's computer systems because the University is not prepared to risk being charged with contempt of court for violating the court order issued by Justice Francis Kovacs. Consequently, the <alt.fan.karla-homolka> newsgroup is being suspended until further notice.

*Karla Teale Trial Court Order* (visited Jan. 23, 1994) <uw.newsgroups.uw.general.uw.dcs.news, uwcomputing.support.staff> (on file with the *Seattle University Law Review*).

Reacting to the announcement the next day, one Waterloo user wondered openly how much the load on the network would increase in the next few weeks "as Canadian university students have their friends in other places e-mail them the trial transcripts." In that correspondent's opinion, "the nature of international media (including the Internet) means a court reportage ban must be one of two things: total, or useless." *Id.*

Another suggested that the University's action was largely symbolic, serving notice that it disapproved of the "use of university resources to evade a publication ban imposed by a court of law." *Id.* Yet another speculated that the action might make it appear that the University was "taking responsibility for all the crap that flows through the news system, which I would worry

of the Peace Bridge using a loudspeaker to read details from the *Washington Post* story.<sup>328</sup> Ontario Attorney General Boyd said she was taking a potential breach by the *Toronto Star* "very seriously" when it carried a photograph of the *Buffalo News* on its front page.<sup>329</sup> Finally, some unknown ban-breaker placed photocopied newspaper articles on the case on car windshields in downtown Edmonton, Alberta.<sup>330</sup>

By the end of 1993, the publication ban had transformed the Homolka-Bernardo affair from a sensational, but purely local, crime story to an international cause célèbre. Newspapers all over the world carried the outlawed details,<sup>331</sup> *The New York Times* and *The Wash-*

was opening up a whole other can of worms." *Id.*

The computer network was not the only target of University officials. An article later reprinted on the Internet revealed that Kalbfleisch's memo had also ordered university librarian Murray Shepherd to remove newspapers containing the offending material from its shelves: "The law is quite clear and the University is placed at risk of being charged and prosecuted if material which breaches a Court Order [sic] is received and distributed by the University. By this memo, I am directing you to take whatever steps are necessary to remove this material from the Library and from the network on the basis that the University is not prepared to risk being charged with violating a Court Order [sic]."

On Jan. 30, 1994, a Carleton University student named Shawn W. Yerxa posted the following:

Hi All:

I need some help. As most probably know, much of the material about the Homolka/Teale case is being suppressed in Canada under court order. I have a few questions about how far this can go. The university (Carleton) has been deleting E-mail and files in directories which have (it seems) references to the case. The deletions are arbitrary and not restricted to banned material. For instance, I sent a copy of the court order (Kovacs) to a friend and it was immediately vaporized.

Q1) My files, the university's machine, friends' work directory, who has the legal right to do what to who? Can they arbitrarily, without warning, destroy files they deem to be unacceptable?

Q2) Is it common for university system op[er]ator[s] to be poking around dumping people's files?

Q3) I understand that a masters student is doing a project on the case and lost several relevant files. What recourse does the student have?

Help!! and thanks, swy. p.s. I hope this makes it out of the Carleton black hole!

FAQ 4.0, *supra* note 261 (visited Jan 30, 1994) <alt.censorship>.

328. Nicholas Pron, *Lid Blown Off Ban*, *TORONTO STAR*, Dec. 1, 1993, at A1. "'Hear ye, hear ye,' screamed Darren McKee, of WGRF. 'Let freedom ring out for all our brothers and sisters to the north.'" *Id.*

329. William Walker, *Star Probed in Homolka Court Ban*, *TORONTO STAR*, Dec. 1, 1993, at A1.

330. *Homolka Articles Left on Windshields*, *TORONTO STAR*, Dec. 23, 1993, at A10.

331. See, e.g., Stan Josey, *2 Israeli Papers Publish Details of Karla Homolka Trial*, *TORONTO STAR*, Dec. 19, 1993, at A6 (trial details carried in U.S. editions of Hebrew language Israeli newspapers *Maariv* and *Yediot Achronot* sold in Canada); Jim Wilkes, *Paper Carrying Homolka Details Pulled from Stands*, *TORONTO STAR*, Dec. 3, 1993, at A1 (trial details carried in the *Independent of London*). *Yediot Achronot* later denied the story as to its coverage. *Israeli*

ington Post editorialized against the publication ban,<sup>332</sup> and the Ontario Prime Minister railed against the "disrespectful" American press.<sup>333</sup> Canadians themselves were sharply divided on whether the ban should have been imposed, whether it had been effective, and whether the U.S. news media was justified in defying it.<sup>334</sup> The Crown continued to defend the ban<sup>335</sup> and to deny the media's standing to challenge it.<sup>336</sup> The next step would be a hearing before the Court of Appeal for Ontario beginning January 31, 1994.<sup>337</sup>

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*Newspaper Won't Defy Ban; Correction*, TORONTO STAR, Dec. 21, 1993, at A3.

332. "With due respect to Canada's sovereign power and the judge's sincerity, his action is both futile . . . and wrong in principle." *A Bad Gag Order in Canada*, N.Y. TIMES, Dec. 4, 1993, at 14. "[I]t's a bad idea to give judges anywhere the power to pick and choose which facts can be the subject of commentary and which cannot. And when that edict seeks to keep information from crossing a border between people most of whom speak the same language and have access to the same media, the policy is foolhardy as well." *Canada: Crime and Censorship*, WASH. POST, Dec. 4, 1993, at A18.

333. William Walker, *Rae Slams 'Disrespectful' U.S. Media*, TORONTO STAR, Dec. 1, 1993, at A1. "'I would hope one would see a greater deal of respect from our [American] neighbors for a decision that has been taken by a judge,' [Ontario Premier Bob] Rae told reporters at Queen's Park. 'It has not been lightly taken. It is not a political decision. This is not a decision of government, but of an Ontario Court judge,' Rae said." *Id.*

334. Stephen Bindman, *Poll Casts Doubt on Gag Order; 26% in Ontario Say They've Beaten Homolka Ban*, TORONTO STAR, Dec. 29, 1993, at A2. An Angus Reid-Southam News telephone poll of 1,510 Canadian adults conducted December 15-20 found that 33 percent of respondents disagreed with imposition of the publication ban, while 28 percent supported the order. *Id.* "The remaining 35 percent were unaware of the case." *Id.* Forty percent said trial details had become public in spite of the ban, while twenty-one percent thought the gag order had been effective. *Id.* Thirty-four percent believed U.S. news media were justified in carrying those details; 27 percent disagreed. *Id.* "The poll is considered accurate nationally within 2.5 percentage points nineteen times out of twenty." *Id.*

In Ontario alone, 26 percent claimed to know banned details, prompting Angus Reid pollster John Wright to suggest that a "significant number" of Ontarians either actively sought or at least received information that they deemed to be in violation. *Id.* Carleton University media law professor Klaus Pohle said the results of the poll "'seem to support those who [c]ontended, all along that the ban has not worked; that it has, in fact, been counterproductive.'" *Id.*

335. William Walker, *Homolka Ban Is Working, Boyd Claims 'I Don't Believe Everybody Knows' Trial Details*, TORONTO STAR, Nov. 30, 1993, at A8. "'I don't believe almost everybody knows—not at all. There may be many people who know. Whether there is a general enough knowledge to disrupt the court process or not, I do not believe that is the case,' [Ontario Attorney General Marion] Boyd told reporters." *Id.*

336. Nick Pron, *Don't Hear Media Claim, Court Urged*, TORONTO STAR, Dec. 1, 1993, at A4. A brief filed by the Attorney General's ministry on November 30 said the court had no jurisdiction to hear the media appeals to quash the gag order because civil applications cannot be brought in criminal trials. Moreover, the publication ban orders were not "'government orders,'" the thirty-two-page brief stated, so the Charter of Rights and Freedoms does not apply. *Id.*

337. Nick Pron, *Bernardo Lawyers Join Appeal to End Ban*, TORONTO STAR Dec. 11, 1993, at A7. On December 10, the Court of Appeal for Ontario granted a motion filed by Paul Bernardo's defense team filed to intervene in the media's challenge of the publication ban. *Id.*

## 5. The Legal Battle

The hearing before Chief Justice Charles Dubin and four other justices opened with Michall Fairburn arguing for the Crown that the media should not even be heard, lest it lead to interventions by other parties and delay criminal trials.<sup>338</sup> Chief Justice Dubin appeared to agree, asking Canadian Broadcasting Corp. (CBC) attorney Ian Binnie, "'What you're saying is that anybody who has a complaint can go out and get a lawyer and serve notice of motion . . . anybody in the courtroom can do what you're doing.'" <sup>339</sup>

Notwithstanding those doubts, Chief Justice Dubin allowed the media lawyers to proceed with their arguments the following day, though he said the court would await a Supreme Court of Canada ruling on jurisdiction in a similar case.<sup>340</sup> Patricia Jackson, representing Thomson Newspapers, argued that public confidence in the judicial system required an open process, especially where, as here, it appeared that plea bargaining was involved.<sup>341</sup> "'It is a notorious case and the public has a need to know how the court dealt with it,'" she said.<sup>342</sup> The CBC's Binnie argued that the court should consider Bernardo's position opposing the ban.<sup>343</sup>

The hearing's third day was, by all accounts, a disaster for the media lawyers, as the justices appeared to lose patience with their arguments.<sup>344</sup> When *Toronto Sun* lawyer Clifford Lax argued that the ban would be ineffective, he was interrupted several times by Justices Patrick Galligan and Marvin Catzman.<sup>345</sup> "'As I understand it,' [Justice] Galligan said, 'if the order is going to be disobeyed, the

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338. Nick Pron, *Top Court Urged to Reject Appeal by Media of Homolka Trial Ban*, TORONTO STAR, Feb. 1, 1994, at A2. "'Granting the media the right to appeal could create problems which this court has sought to avoid,'" Michall Fairburn told the Ontario Court of Appeal. "'Society has a vested interest . . . in trials not being interrupted,'" she said. *Id.*

339. *Id.*

340. Nick Pron, *Court of Appeal Lets Media Fight Homolka Ban but Final Decision Must Await Ruling by Supreme Court*, TORONTO STAR, Feb. 2, 1994, at A3. The court anticipated the jurisdictional ruling would come in an appeal of publication bans imposed in Saskatchewan's Martensville sex abuse trials. In fact, that decision, *R. v. S.(T.)* [1994] 3 S.C.R. 952, 960, was issued on December 8, 1994, the same day as the *Dagenais* decision, and essentially followed the rules laid down in *Dagenais*.

341. Pron, *supra* note 340, at A3.

342. *Id.*

343. *Id.*

344. Nick Pron, *Judges Rake Lawyers in Ban Hearing; Court Is Tough on Media Counsel Fighting Muzzle on Homolka Trial*, TORONTO STAR, Feb. 3, 1994, at A2. "One lawyer said he should have been wearing a fireproof suit, while another wondered who was going up next to 'get roasted on the spit.'" *Id.*

345. *Id.*

order should not be made. I find it outrageous that the court shouldn't make an order because someone might disobey it."<sup>346</sup> Star lawyer Bert Bruser was not even permitted to defend the media's coverage of the case.<sup>347</sup>

The Crown concluded the hearing on day four, with attorney Casey Hill telling the court that the ban was a "minimal infringement" on the rights of the media."<sup>348</sup> Calling the ban a "publication postponement," Hill told the court that it would be wrong to

describe this as a total ban, a trial in secret, a trial in darkness. . . . The press was there. They heard what was said. They presumably wrote down what was said. Nothing has been lost from the goals of open court principle. Public debate can occur. It's going to happen later.<sup>349</sup>

Closing the courtroom entirely would have been "more Draconian . . . more oppressive," Hill concluded.<sup>350</sup>

As it happened, the arguments were of no consequence. Following the *Dagenais* decision, wherein the Supreme Court of Canada vested appeals of publication bans solely in itself, the action before the Court of Appeal for Ontario was dismissed for lack of

346. *Id.*

347. *Id.*

348. Nick Pron, *Homolka Ban Called 'Minimal Infringement' of Media Rights; Trial not Held in Total Secrecy, Crown Argues*, TORONTO STAR, Feb. 4, 1994, at A2.

349. *Id.*

350. *Id.* To an American observer, raised on the notion that "prior restraint" is the most heinous of all conceivable abridgments of freedom of speech, the "device" of allowing the press to attend a trial on which they are forbidden to report seems peculiar at best. But it is relatively common in Canada. STUART M. ROBERTSON, *COURTS AND THE MEDIA* 167-71 (1981).

The media are on occasion dealt with by the courts as representatives of the public. It is a common judicial procedure, when excluding the public from the courtroom, to allow the media to remain with the understanding that they will not publish the proceeding, or else not identify certain information. This accommodation by the courts does not arise from an enforceable right of the press or the public to attend, but from a genuine respect by the courts for the necessity and effectiveness of public review of the court processes. The public have a greater confidence in the administration of justice if the proceedings can be viewed, even if there is some restriction on publication. This compromise by the courts is called a device.

*Id.* at 167-68. Quare whether, in this respect, the Canadian approach to conflicts between free press and fair trial may not better serve the societal interest in freedom of speech than the American, where the aversion to prior restraint is so strong that it is easier to close a courtroom altogether than prohibit the press from reporting what it knows. The First Amendment absolutist would respond that, although society's interest is best served by keeping the courtrooms open and the presses running, a conspiracy of silence between government and the media is more destructive of a free press than a closed courtroom in any given case.

jurisdiction and the media unsuccessfully sought leave to refile their appeal before the Supreme Court of Canada.<sup>351</sup>

## II. THE PUBLICATION BAN

This section closely examines the rationale behind Justice Francis Kovacs's publication ban, as well as media arguments in opposition to the ban. This section concludes with a detailed discussion of the *Dagenais* decision, which must have been influenced by the publication ban in the Homolka murder trial and, in turn, all but ensured that the ban would never be reviewed by a higher court.

### A. Text and Rationale

The order issued by Justice Francis Kovacs on July 5, 1993, was seventy-seven pages long, thoroughly documented, and carefully reasoned.<sup>352</sup> After laying out the charges against Homolka and Bernardo, Justice Kovacs noted that Bernardo had originally applied for a publication ban, then abandoned his application, and now intervened to oppose the ban sought by the Crown.<sup>353</sup>

In his application to intervene, Bernardo argued that the prosecution had no standing to assert his fair trial interests as a basis for limiting access to the proceedings, that his right to control the conduct of his defense was personal and not subject to scrutiny by the Crown, that the conduct of the police and Attorney General belied the prosecution's concern for his fair trial interests, and that change of venue and jury-selection procedures could remedy any potential prejudice.<sup>354</sup> Bernardo also maintained that the Crown had not met its burden of overcoming his right to an open trial under section 2(b) of the Canadian Charter of Rights and Freedoms by showing that press coverage would preclude empaneling an impartial jury that would honor its oath to try the case on the facts.<sup>355</sup> And Bernardo asserted

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351. John Duncanson, *Appeal of Homolka Ban May Go Right to Top Court; Move by Media Outlets Follows Recent Ruling*, TORONTO STAR, Dec. 20, 1994, at A5; *Top Court Won't Hear Challenge to Homolka Gag*, MONTREAL GAZETTE, May 5, 1995, at A8.

352. R. v. Bernardo, [July 5, 1993] No. 125/93, O.J. No. 2047 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>.

353. *Id.* at paras. 2-5.

354. *Id.* at para. 6.

355. *Id.* at para. 7. The reference is to § 2(b) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (U.K.), ch. 11:

2. Everyone has the following fundamental freedoms:

....

that, as a practical matter, he would be prejudiced by a publication ban because Homolka had heretofore been portrayed in the press as a victim and had been insulated by police from any attack on her credibility by the "deal" she had apparently made in the negotiated plea.<sup>356</sup>

Homolka's counsel characterized this latter argument as advocating "trial by press" and warned that the "sensationalism" that marked press coverage to date would continue if the trial were open.<sup>357</sup> The psychological harm to Homolka's family, as well as the trauma to the community, were also factors to consider in support of the publication ban, Homolka argued.<sup>358</sup> Justice Kovacs agreed that press attention to the case was "far out of the ordinary," in both Canada and the United States.<sup>359</sup> He conceded that American newspapers and broadcast signals were readily available in southern Ontario and that there was no effective way to black out U.S. cable television channels.<sup>360</sup> Justice Kovacs also acknowledged reports that the American media did not feel bound by a Canadian court's publication ban, but ruled those reports inadmissible for their truth.<sup>361</sup>

Justice Kovacs then enumerated four issues before him. First, does the Crown have standing to bring an application to ban publication on the basis of the fair trial interests of Paul Bernardo? Second, should he issue the requested ban in light of the media's constitutional right to "freedom of the press and other communication" under Section 2(b)? Third, would such a ban be effective if the American media did not consider themselves bound by it? Finally, should any or all members of the public be excluded from the courtroom pursuant to section 486(1) of the Criminal Code?<sup>362</sup>

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(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. . . .

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2b.  
356. *Id.*

357. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, para. 9 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>.

358. *Id.*

359. *Id.* at paras. 12-15.

360. *Id.*

361. *Id.* at para. 16.

362. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, para. 17 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>. Section 486(1) of the Criminal Code, R.S.C., ch. C-46, (1985) (Can.) as amended, provides as follows:

486. (1) Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the courtroom for all or any part of the proceedings, he may so order.

On the first issue, Justice Kovacs accepted the premise that Bernardo had the right to control the conduct of his defense, but he did not accept Bernardo's argument that the Crown's application for a publication ban was an intrusion on that right.<sup>363</sup> Finding the right to a fair trial a societal, as well as individual, interest,<sup>364</sup> he held that the Crown had standing to apply for the publication ban based on the societal right to ensure that Bernardo has a fair trial.<sup>365</sup> Even if the Charter referred only to an individual right to a fair trial in section 11(d), he said, the societal right was preserved by section 26.<sup>366</sup> In any event, he said he had authority at common law to impose the ban *sua sponte*.<sup>367</sup>

363. *Id.* at para. 27. Bernardo had cited two cases in support of his argument on this issue: *R. v. Swain* [1991] 63 C.C.C.3d 481, 507-508 (S.C.C.) (the Crown's introduction of evidence of the accused's insanity, where the accused did not put his mental capacity for criminal intent into question, interfered with the accused's conduct of the defense), and *Cloutier v. R.* [1979] 99 D.L.R.3d 577, 599-600 (S.C.C.) (the Crown may not seek to set aside a verdict acquittal on the ground that the accused was wrongly denied a peremptory challenge during jury selection).

364. *Bernardo*, No. 125/93, O.J. 2047, at para. 28. In support of that proposition, Justice Kovacs cited *R. v. Morin* [1992] 71 C.C.C.3d 7 (S.C.C.) (recognizing society's interest in an accused's right to a timely trial); and *R. v. Lortie* [1985] 21 C.C.C.3d 436 (Que. C.A.) (finding the prosecution had a right to oppose the broadcast of videotapes of the murders for which the accused had been convicted, even though the accused supported the broadcast, in case a new trial might be ordered). Justice Kovacs also relied on *Lortie* to dispose of Bernardo's argument that, in all of the cases cited by the Crown, it was always a co-accused who applied for the ban or there was no opposition to a ban. *Bernardo*, No. 125/93, O.J. 2047, at para. 48.

365. *Bernardo*, No. 125/93, O.J. 2047, at para. 32.

366. *Id.* at para. 33. Section 11(d) of the Canadian Charter of Rights and Freedoms provides that:

11. Any person charged with an offence has the right

....

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. . . .

CAN. CONST. (Constitution Act, 1982) pt. I, (Canadian Charter of Rights and Freedoms), § 11d. Section 26 provides:

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

CAN. CONST. (Constitution Act, 1982) pt. I, (Canadian Charter of Rights and Freedoms), § 26.

367. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, para. 34 (Ont. Ct. Just. July 5, 1993) (visited on July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>. To support that assertion, Justice Kovacs relied upon dicta from *Church of Scientology of Toronto v. R.* (No. 6) [1986] 27 C.C.C.3d 193, 209 (Ont. H.C.) (holding that the authority of a court to impose a publication ban on the application of a coaccused is "but an incident of the general authority of courts of record to do that which is necessary to regulate their proceedings and ensure justice . . ."). *Church of Scientology of Toronto*, in turn, drew its authority from two old English cases, *R. v. Clement*, 106 E.R. 918 (K.B. 1821), and *R. v. W.I. Clement*, 147 E.R. 404 (Ex. D. 1822). *Church of Scientology of Toronto*, 27 C.C.C.3d at 206-9. Justice Kovacs also cited *R. v. R.S.*, unreported decision of Wood J., No. CC 881914 (B.C.S.C. Mar. 14, 1989), and *R. v. Barrow* [1989] 48 C.C.C.3d 308 (N.S.S.C.). *Bernardo*, No. 125/93, O.J. 2047, at para. 35.



Justice Kovacs would not be dissuaded by Bernardo's appeal to fairness in view of police and prosecutorial misconduct.<sup>368</sup> A publication ban must rest on the balancing of constitutional free press and fair trial rights, he said, not on "trying to even out the image of Paul Bernardo Teale in the press that is submitted to have been depicted unfairly."<sup>369</sup> Nor did it matter that the Crown was in an adversarial position to Bernardo at trial.<sup>370</sup> Before the trial, the Crown is in a quasi-judicial role, Justice Kovacs said, and it is in that capacity that the Crown is obligated to seek a publication ban when fair trial interests may be threatened.<sup>371</sup> Accordingly, Justice Kovacs found that the Crown had standing to assert a societal interest in a fair trial for Paul Bernardo, notwithstanding Bernardo's objection to a ban on publication.<sup>372</sup>

Moving on to the second issue, Justice Kovacs noted the Crown's assertion that the right to a fair trial must prevail over freedom of the press when the two conflict,<sup>373</sup> and he enumerated sixteen different arguments put forward by Bernardo and the media for reaching the opposite conclusion here.<sup>374</sup> He then embarked on a lengthy analysis

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368. *Bernardo*, No. 125/93, O.J. 2047, at para. 39.

369. *Id.* at para. 40.

370. Bernardo had argued that the Crown's adversarial role at trial precluded its urging a publication ban against Bernardo's wishes. *Id.* para. 42. In *Bain v. R.* [1992] 1 S.C.R. 91, cited for support, the Court held that Code provisions giving the Crown forty-eight stand-asides in the jury selection process infringed on the accused's right to a fair trial. "It is not unreasonable to think that there are times when the Crown's challenges or standbys are motivated by an anxiety to secure a conviction rather than a strictly quasi-judicial interest in the fairness of the trial." *Bain*, 1 S.C.R. at 155-56.

371. *Bernardo*, No. 125/93, O.J. 2047, at para. 45. In fact, Justice Kovacs distinguished the *Swain* and *Cloutier* cases on the ground that, in each, the Crown was acting as adversary. "That is not the case here. I am dealing with a pretrial motion involving a societal interest." *Id.* at para. 46.

372. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, para. 60 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>. Even if the Crown lacked such standing, Justice Kovacs said later, Bernardo cannot waive his right to a fair trial. "If Paul Bernardo Teale is innocent his waiver of his right to later argue that he cannot receive a fair trial would be tragic. If on the other hand, he is guilty, the harm done to society by a successful application for a stay would be inestimable." *Id.* at para. 86.

373. *Id.* at para. 51. Counsel for Homolka supported that view. *Id.*

374. *Id.* at para. 52. Specifically: (1) the Crown has not satisfied its burden to show that there was a real risk that a fair trial would be impossible; (2) less drastic remedies are available to ensure the selection of an impartial jury; (3) the capacity of modern juries to try the case on the evidence and follow the judge's instructions will ensure a fair trial; (4) the concept of open justice is essential to public scrutiny of government, especially where parties to a negotiated plea were seeking the ban; (5) the media are surrogates for the public and have a duty to scrutinize the judicial process; (6) the need for immediacy in reporting is compelling because the Bernardo trial was at least eighteen months away; (7) there are no reported cases of publication bans when a co-accused opposed the ban; (8) "publication enhances a fair trial"; (9) "the factors considered in the

of free-press-versus-fair-trial precedent, beginning with quotations from Jeremy Bentham<sup>375</sup> and Justice Wilson<sup>376</sup> to the effect that freedom of the press both at common law and under the Charter is a "hallmark of a free and democratic society."<sup>377</sup> That said, however, Justice Kovacs pointed out that both statutory<sup>378</sup> and judicial<sup>379</sup> restrictions have been imposed on that freedom, particularly where necessary to ensure a fair trial.<sup>380</sup>

[*Church of Scientology [of Toronto]* case are not satisfied"; (10) a trial must be public where, as here, there is no compelling reason to close it; (11) even a temporary news blackout is fundamentally inconsistent with free speech; (12) other cases, since [*Church of Scientology [of Toronto]*], have shown the courts' recognition that juries can try cases on the evidence, uninfluenced by media reports; (13) "the case of [*Canadian Broadcasting Corp.*] v. Dagenais [1992] 12 O.R.3d 239 (Ont. C.A.), [rev'd, [1994] 3 S.C.R. 835] is distinguishable as a case based on a fictional account"; (14) the "*Oakes* test," requiring a rational connection between means and objective, is not met because there is no evidence that a fair trial cannot be had; (15) the community is better served by accurate news reporting than by rumors; and (16) psychological harm to victims and trauma to the community are not considerations in law. *Id.*

375. *Id.* at para. 56 (quoting *Scott v. Scott*, A.C. 417 (H.L. 1913) (Aust.)):

In the darkness of secrecy sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any checks applicable to judicial injustice operate. Where there is no publicity there is no justice. It is the keenest spur to exertion and the surest of all guards against probity. It keeps the judge himself while trying under trial.

376. *Id.* at para. 59 (quoting *Edmonton Journal v. A.G. Al.* [1989] 64 D.L.R.4th 577, 588 (S.C.C.)):

In summary, the public interest in open trials and in the ability of the press to provide complete reports of what takes place in the court room is rooted in the need (1) to maintain an effective evidentiary process; (2) to ensure judiciary and juries that behave fairly and that are sensitive to the values espoused by society; (3) to promote a [s]hared [sic] sense that our courts operate with integrity and dispense justice; and (4) to provide an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the Courts affects them.

377. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, para. 61 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>.

378. *Id.* at para. 62. Justice Kovacs specifically cited restrictions on publication of a complainant's identity in sexual offenses (§ 486(3)), of evidence at a preliminary inquiry (§ 539), and of evidence given at a show cause hearing (§ 517). He conceded Bernardo's point that the latter two examples are mandatory only at the request of the accused but permissive when requested by the Crown. As to the first, however, he noted that the restriction was mandatory in the complainant's interest, not that of the accused. *Id.* One might question how the first example relates to a fair trial interest at all, although Justice Kovacs asserted that all were enacted by Parliament to ensure fair trials. *Id.*

379. *Id.* at para. 63. Justice Kovacs quoted *R. v. Barrow* [1989] 48 C.C.C.3d 308 (N.S.S.C.):

This Court has inherent jurisdiction to prohibit publication and broadcast in order to protect an accused's right to a fair trial or to protect the fairness of a trial then conducted. The exercise of that jurisdiction does not contravene § 2(b) of the Canadian Charter of Rights and Freedoms.

*Id.*

380. *Bernardo*, No. 125/93, O.J. 2047, at para. 64.

While the court has inherent jurisdiction to impose such restrictions, Justice Kovacs said, that authority is limited to protecting a "social value of superordinate importance."<sup>381</sup> Two such values, he said, "are the protection of an accused presumed innocent and the protection of the integrity of the Court's process."<sup>382</sup> Here, the integrity of the court's process would be threatened by the revelation of facts disclosed at Homolka's trial that might not be admissible against Bernardo.<sup>383</sup> It remained only to balance the competing constitutional values.<sup>384</sup>

Justice Kovacs reviewed several cases holding the right to a fair trial paramount when it conflicts with freedom of the press,<sup>385</sup> and then two cases calling for ad hoc balancing.<sup>386</sup> After considering six balancing factors, he found as follows: (1) that Bernardo might elect a jury trial on at least some of the counts against him,<sup>387</sup> (2) that the distant date of any trial could be offset by the sensational nature of these crimes and the media's tendency to "refresh the public's minds" just before trial;<sup>388</sup> (3) that the evidence presented in Homolka's trial,

381. *Id.* at para. 83 (quoting *A.G. N.S. v. MacIntyre* [1982] 1 S.C.R. 175, 186-87 (holding that curtailment of public access to trials can only be justified where necessary to protect social values of superordinate importance, one of which is protection of the innocent)). Justice Kovacs rejected the Crown's assertion that protecting the psychological well-being of Homolka's family or the community could justify a publication ban, as that would create new substantive law beyond the court's inherent jurisdiction. *Bernardo*, No. 125/93, O.J. 2047, at paras. 75-76.

382. *Id.* at para. 83. Justice Kovacs cited *MacIntyre*, 1 S.C.R. at 186-87, for the first of these values. *Bernardo*, No. 125/93, O.J. 2047, at para. 83. The second he takes from *Church of Scientology of Toronto*, where the court reviewed the right at common law to prohibit publication where several accused were charged for crimes arising from common facts. *Church of Scientology of Toronto v. R.* (No. 6) [1986] 27 C.C.C.3d 193 (Ont. H.C.).

383. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, para. 80 (Ont. Ct. Just.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>.

384. *Id.* at para. 93.

385. *Id.* at paras. 94-99. Specifically: *Canadian Newspapers Co. & R.* [1984] 16 C.C.C.3d 495, 500 (Man. C.A.); *Re Southam Inc. & R.* (No. 2) [1982] 70 C.C.C.2d 264, 267 (Ont. H.C.); *R. v. Banville* [1983] 3 C.C.C.3d 312, 316 (N.B.Q.B.); *R. v. Sophonow* (No. 2) [1983] 34 C.R.3d 287, 291 (Man. C.A.); *Southam v. Brassard* [1987] 38 C.C.C.3d 74 (Que. S.C.); *Canadian Broadcasting Corp. v. Dagenais* [1992] 12 O.R.3d 239 (Ont. C.A.).

386. *Bernardo*, No. 125/93, O.J. No. 2047, at paras. 100-02. *R. v. Dalzell* [1991] 63 C.C.C.3d 134, 148 (Ont. C.A.); *Church of Scientology of Toronto v. R.* (No. 6) [1986] 27 C.C.C.3d 193, 221 (Ont. H.C.). *Bernardo*, O.J. 2047, at paras. 100-02.

387. Justice Kovacs later pointed out that, while trial by judge alone may be available to Bernardo, that is not an entirely unfettered right. He cited the unreported Ottawa decision of Charron, J., in *R. v. MacGregor*, O.J. No. 3040 (1992), however, to suggest that the Crown could not refuse to consent to a bench trial in a murder case where excessive publicity precluded a jury trial. *Bernardo*, No. 125/93, O.J. 2047, at para. 121.

388. Justice Kovacs cited *R. v. Lazell* [1988] 48 C.R.R. 258 (H.C.) (permitting publication until "about" six months before the trial); and *Pilzmaker & Law Soc'y of Upper Can.* [1989] 70 O.R.2d 126 (Ont. Div. Ct.). *R. v. Bernardo*, No. 125/93, O.J. 2047, para. 105 (Ont. Gen. Div. July 5, 1993).

untested there by Bernardo and arising from the same factual background as the evidence to be presented against him, would be highly prejudicial to Bernardo, "especially if inadmissible against him";<sup>389</sup> (4) that publication is inevitable;<sup>390</sup> (5) that neither voir dire nor change of venue would be particularly efficacious because of the widespread publicity;<sup>391</sup> and (6) the terms of the publication ban could be tailored to inform the public of essential information and preclude the reporting of facts common to charges against both Homolka and Bernardo.<sup>392</sup>

As to the prospective Bernardo jury, Justice Kovacs acknowledged the deference paid by Canadian courts to the capacity of jurors to try a case on the evidence alone, disregarding what they may have heard, seen, or read.<sup>393</sup> But he returned again to the statutory and judicial restrictions on publicity,<sup>394</sup> as well as expert testimony in a recent, high-profile murder trial,<sup>395</sup> to conclude that "each case must be decided on its own merits" and that "a court must exercise its discretion."<sup>396</sup>

389. *Bernardo*, No. 125/93, O.J. 2047, at para. 106.

390. *Id.* at para. 107.

391. *Id.* at para. 108. Justice Kovacs offered no factual basis for his finding that voir dire and change of venue would be ineffective, citing only the holding in *MacGregor* that publicity prevented a fair trial by jury, despite the availability of challenge for cause. *Bernardo*, No. 125/93, O.J. 2047, at para. 118.

392. *Bernardo*, No. 125/93, O.J. No. 2047, at paras. 103-10.

393. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, paras. 122-24 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>. Justice Kovacs cited *R. v. Hubbert* [1977] 29 C.C.C. 279, 289, *aff'd*, 2 S.C.R. 267, 289 ("There is an initial presumption that a juror . . . will perform his duties in accordance with his oath."); *R. v. Makow* [1974] 28 C.R.N.S. 87, 94 ("Today's jurors are intelligent people, well able to put from their minds something they heard elsewhere . . . that they have been told to disregard."); *R. v. Vermette* [1988] 50 D.L.R.4th 335, 392 (S.C.C.) ("In an extreme case . . . such publicity should lead to challenge for cause at trial, but I am far from thinking that it must necessarily be assumed that a person subject to such publicity will necessarily be biased."); *R. v. Corbett* [1988] 41 C.C.C.3d 385, 401 (S.C.C.) ("The Court should not be heard to call into question the capacity of juries to do the job assigned to them.").

394. *Bernardo*, No. 125/93, O.J. 2047, at para. 125.

395. *Id.* at para. 126 (quoting *R. v. MacGregor*, [1992] O.J. No. 3040 (an unreported Ottawa murder case in which the accused was charged with first degree murder of his wife with a crossbow)).

[T]here are certain particular difficulties in cases of massive pretrial publicity where emotions run high and where there is a perception of apparent societal consensus as to the desired result. In such cases it is more difficult to identify those prospective jurors who lack the required impartiality through the challenge for cause process particularly under our Canadian system of law which does not permit an in depth probe into the prospective juror's beliefs and opinions.

*Id.*

396. *Id.* at para. 128.

Exercising that discretion, Justice Kovacs rejected the standard urged by the Canadian Broadcasting System: "a real and substantial risk that a fair trial would be impossible."<sup>397</sup> After hearing submissions from counsel,<sup>398</sup> he imposed the gag order.<sup>399</sup> And to protect the order's integrity, Justice Kovacs resolved the last two questions facing him by excluding the foreign press and most of the public from the courtroom.<sup>400</sup>

### B. *The Media Challenge*

The media's legal challenge to the Kovacs gag order before the Ontario Court of Appeal argued that: (1) restricting access to Homolka's trial and banning publication of its details infringed freedom of the press guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms,<sup>401</sup> and (2) those infringements could not be justified by section 1 of the Charter, which

guarantees the rights and freedoms set out in [the Charter] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>402</sup>

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397. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, para. 135 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>> (quoting *Canadian Broadcasting Corp. v. Dagenais* [1992] 12 O.R.3d 239, 247, *rev'd*, [1994] 3 S.C.R. 835).

398. *Id.* at paras. 137-39.

399. *Id.* at paras. 140-43. See also *supra* notes 206-08 and accompanying text.

400. *Id.* at para. 137.

401. Appellant, *Canadian Broad. Corp.*, Factum, at 9, *Thomson Newspapers v. R.*, (Court of Appeal for Ontario File Nos. C15928, C15934, C15938, C15948) [hereinafter *CBC Factum*] (brief on file with the *Seattle University Law Review*). Other appellants were *Toronto Sun Publishing Corp.* and *Toronto Star Newspapers Ltd.*; *Rogers Cable T.V. Ltd.* and *Paul Bernardo* were intervenors.

402. *Id.* at 17.

The Crown did not seriously challenge the substance of media's first assertion,<sup>403</sup> leaving section 1 of the Charter as the primary battleground.<sup>404</sup>

According to the Canadian Broadcasting Corporation (CBC), the publication ban imposed by Justice Kovacs was not reasonable, was not prescribed by law, and was not demonstrably justified in a free and democratic society.<sup>405</sup> Both the CBC and the Crown devoted a great deal of attention to whether Justice Kovacs had the legal authority to impose the publication ban. As it happened, the Canadian Supreme Court's decision in *Dagenais* would later seem to take this issue for granted, subjecting the courts' common law authority to constitutional analysis but never questioning the existence of that authority.<sup>406</sup> Nevertheless, the debate on the issue of whether Kovacs had the legal authority to impose the publication ban affords a convenient window

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403. Respondent's Factum, at 20, *Thomson Newspapers v. R.* (Court of Appeal for Ontario, File Nos. C15928, C15934, C15938, C15948) [hereinafter Respondent's Factum] (brief on file with the *Seattle University Law Review*):

It is respectfully conceded that freedom of expression and freedom of the press, whether addressed in terms of the common law or section 2(b) of the *Charter*, are restricted by the exercise of inherent and statutory jurisdiction to defer publication in a criminal proceeding. It is submitted however that the publication deferral feature, entrenched in our criminal justice procedure, is a reasonable and demonstrably justifiable limit protective of fair trial rights.

*Id.*

The Crown's concession would not ordinarily relieve the scholar of responsibility for defining the protected rights and freedoms and so clarifying the infringement. The concession was, after all, tactical; attempting to gainsay the importance of such values as press freedom and open courts would be futile, if not counterproductive. By conceding the point, the Crown rendered much of appellants' rhetoric ineffectual. There is, however, a principled rationale for avoiding the first prong of the analysis. As Philip Anisman argues, during the first step in the analysis required by a constitutional challenge under the Charter, the rights and freedoms allegedly infringed should be "interpreted as broadly as the language will reasonably permit so that the balancing process may occur under section 1." Philip Anisman, *Application of the Charter: A Structural Approach*, in *THE MEDIA, THE COURTS, AND THE CHARTER* 13-14 (Philip Anisman & Allen M. Linden eds., 1986). Defining rights and freedoms without the standards that section 1 provides necessarily gives disproportionate weight to countervailing interests and shifts the burden of proof from the actor who wants to limit freedom to the actor whose freedom is limited. *Id.*

404. The Crown had earlier attacked the media's argument as improperly relying on the Charter analysis to challenge a court order, but here the Crown argued that the order was lawfully made "[w]hether viewed from the perspective of a section 1 Charter justification, or a reaffirmation by a common law court that the principles underlying a common law rule are in step with the values enshrined in the Charter." Respondent's Factum, *supra* note 403, at 18-19. The *Dagenais* Court, deferring the issue of whether the Charter applies to court orders, would later adopt that approach in analyzing the publication ban in that case. See *infra* notes 481-90 and accompanying text.

405. CBC Factum, *supra* note 401, at 17.

406. See *infra* Part II.C.

on the state of the law before *Dagenais* and thus serves to illuminate that decision.

### 1. Prescribed by Law

As noted above, Justice Kovacs found legal authority for his order in section 486 of the Canadian Criminal Code and in the court's "inherent jurisdiction" at common law.<sup>407</sup> The CBC quite correctly, if gratuitously, asserted that nothing in the language of section 486(1) authorizes a judge to impose a publication ban.<sup>408</sup> Although Justice Kovacs explicitly cited that section as authority for his entire order,<sup>409</sup> in his statement of the issues he only associated section 486 with the gag order's public exclusion provisions.<sup>410</sup>

The Crown also viewed section 486(1) as merely an "adjunct" to Justice Kovacs's common law authority,<sup>411</sup> which it saw as an embodiment of the ancient *sub judice* rule under which any publication that endangered the progress or impartiality of a trial might be held in contempt.<sup>412</sup> Acknowledging that the *sub judice* rule itself had little applicability to this case,<sup>413</sup> the Crown suggested that Justice Kovacs's order was a manifestation of this same principle in a form that afforded more certainty than the inchoate threat of contempt.<sup>414</sup>

407. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, paras. 63, 140 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>.

408. CBC Factum, *supra* note 401, at 35. The text of Section 486(1) appears *supra* note 362.

409. *Bernardo*, No. 125/93, O.J. 2047, para. 137.

410. See *supra* text accompanying note 362. Justice Kovacs did, however, indicate that the "proper administration of justice" interest contained in Section 486(1) is a legitimate justification for a publication ban. *Bernardo*, No. 125/93, O.J. 2047, para. 74. More problematic is the CBC's contention that Section 486 may not be invoked to protect the integrity of some other, future proceeding. CBC Factum, *supra* note 401, at 36. Because the Canadian media was not excluded from the Homolka trial, it seems unnecessary to dwell on that point. Nor is there any need to address the CBC's rhetorical challenge to the constitutionality of section 486 if it were found to be broad enough to support the gag order. *Id.* at 37.

The facial validity of section 486(1) was subsequently affirmed by the Canadian Supreme Court in *Canadian Broadcasting Co. v. New Brunswick* [1996] 3 S.C.R. 480, 513-14. See *infra* notes 549-67 and accompanying text.

411. Respondent's Factum, *supra* note 403, at 61.

412. *Id.* at 36.

413. *Id.* "There is some dispute in the authorities as to whether fair and accurate publication of open court proceedings reported in good faith can amount to contempt even where prejudicial to a pending proceeding." *Id.*

414. *Id.* For more on the *sub judice* rule, see CLARE F. BECKTON, *THE LAW AND THE MEDIA IN CANADA* 85-94 (1982); Ronald G. Atkey, *The Law of the Press in Canada*, in *JOURNALISM COMMUNICATION AND THE LAW* 125-131 (G. Stuart Adam ed., 1976). An unsuccessful effort to codify the *sub judice* rule is described in James E. Jefferson, *Loosening the Gag: Free Press and Fair Trial*, 43 U. TORONTO FAC. L. REV. 100, 114 (1985).

The Crown also took pains to distinguish the Canadian and British *sub judice* tradition from the American constitutional approach.<sup>415</sup>

In considering whether the infringement upon free press rights created by the gag order was legitimately "prescribed by law," a threshold concern must be addressed: May a common law principle created long before the constitutional establishment of free press rights serve as the "law" for this purpose, and would the apparent circularity be resolved if that principle were ratified in post-Charter jurisprudence?<sup>416</sup>

As M. David Lopofsky has pointed out, the Charter is not the constitutionalization of the common law, and one may not simply turn to the common law to define constitutional rights and limitations.<sup>417</sup> Although that comment goes more to the larger analysis than to the narrow "prescribed by law" issue considered here, Professor Philip Anisman observed that Canadian judges have tended to rely upon little more than traditional practices to justify their own discretionary orders, without subjecting them to section one analysis at all.<sup>418</sup> Anisman noted that Canadian courts have been willing to strike down regulations and even statutes under section one when the infringement on free expression was not governed by "ascertainable and understandable" standards. Further, Anisman predicted that in time statutory standards will be required for the exercise of judicial discretion as well.<sup>419</sup>

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415. Respondent's Factum, *supra* note 403, at 37-38.

416. Philip Anisman points out that the Canadian Supreme Court has not clearly defined the parameters of Section 1's "prescribed by law" requirement. Anisman, *supra* note 403, at 24-27. In *R. v. Therens* [1985] 1 S.L.R. 613, 639-42 (S.C.C.), Justice LeDain suggested that the limit may result from the application of a common law rule; however, the "prescribed by law" requirement was not at issue in *Therens*, and LeDain's reasoning did not command a majority. *Id.* at 25 and n.138.

417. M. David Lepofsky, *Constitutional Right to Attend and Speak About Criminal Court Proceedings an Emerging Liberty*, 30 C.R.3d 87, 88-89 (1983).

418. Anisman, *supra* note 403, at 24-27. Anisman cites cases striking down mandatory closure provisions as "unnecessarily restrictive of freedom of expression because discretionary closure is adequate," pointing out that none of these cases contains the slightest hint that discretionary closure might also be subject to section one analysis. *Id.* at 26-27 and n.144 (citing *Southam Inc. v. R.* (No. 1) [1983] 41 O.R.2d 113, 134 (Ont. C.A.), and *Canadian Newspapers Co. Ltd. v. A.G. for Can.* [1985] 49 O.R.2d 557, 575-76, 581-82 (Ont. C.A.) (set aside by *Canadian Newspapers Co. v. Can.* (A.G.) [1988] 65 C.R.3d 50).

419. Anisman, *supra* note 403, at 24-27. In its most recent discussion of this point the Canadian Supreme Court, however, reaffirmed the position that a trial court's exercise of discretion "should not be lightly interfered with," but appellate defense would be afforded only where the record discloses facts that support the trial court's exercise of this discretion. *Canadian Broad. Corp. v. New Brunswick* [1996] 3 S.C.R. 480, 518 (S.C.C.). In that particular case, however, the Supreme Court reversed the exclusion order because it did not find sufficient supporting facts. *Id.* at 414-15.



In this case, however, the Crown appeared quite comfortable asserting that a court's inherent jurisdiction to defer publication in appropriate circumstances is "altogether too clear to be brought into question."<sup>420</sup> It cited decision after decision, mostly post-Charter, upholding the practice in various circumstances and then focused on those especially apt cases involving sequential, related criminal trials.<sup>421</sup> Like Kovacs, the Crown found support for the practice primarily in the old English *R. v. Clement* case and the post-Charter *Re Church of Scientology of Toronto and The Queen* case, which relied on *Clement* for its authority.<sup>422</sup>

In the *Clement* case, the Exchequer Division upheld the contempt conviction of a journalist who published an account of the treason trial of the first of two coaccused, violating a prohibition imposed by the trial court to protect the integrity of the second trial.<sup>423</sup> In *Scientology*, the Ontario High Court of Justice reversed a provincial trial judge and held that a coaccused had standing to seek a publication ban covering the earlier trial of one of their number at which that member pleaded guilty.<sup>424</sup> In *Clement*, of course, no constitutional issue arose; in *Scientology*, it was ignored.<sup>425</sup>

The CBC argued that *Clement* was wholly inapposite because there was no need to consider whether the limitation was "prescribed by law."<sup>426</sup> Less compelling, perhaps, was the CBC argument that, unlike the Homolka and Bernardo trials, the sequential *Clement* trials

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420. Respondent's Factum, *supra* note 403, at 48.

421. *Id.* at 50-61.

422. *Id.*

423. *R. v. W. I. Clement*, 147 Eng. Rep. 404 (Ex. Ch. 1822) *aff'g* *R. v. Clement*, 106 Eng. Rep. 918 (K.B. 1821).

424. *Church of Scientology of Toronto v. R.* (No. 6) [1986] 27 C.C.C.3d 193, 220-221 (Ont. H.C.).

425. *Id.* at 220.

In light of the conclusion which I have reached as to the applicants' entitlement to seek the order requested upon the basis of common law principle, it is neither necessary nor desirable in the present circumstances that I consider the Charter arguments here raised.

It may be observed, however, that Canadian courts have in previous instances upheld limited publication bans imposed either directly or through the limitation of access to court proceedings provided that a rational basis exists therefor [sic] and the suspension is no more than is reasonably necessary to ensure the protection of values of superordinate importance. Equally, courts have found offensive to the rights and freedoms guaranteed by the Charter all-embracing, perpetual and nondiscretionary bans, devoid of such rational underpinnings.

*Id.* (citations omitted).

426. CBC Factum, *supra* note 401, at 39.

were formally parts of a single proceeding.<sup>427</sup> The CBC also pointed out that the order in *Clement* had a different purpose than the Kovacs order and that the order's validity was irrelevant to the contempt conviction entertained by the *Clement* court.<sup>428</sup>

More to the point, the CBC argued that *Clement* was decided in a constitutional regime that did not guarantee freedom of expression as a fundamental freedom and was decided at a time when procedural rules to safeguard an accused's right to a fair trial were not firmly established.<sup>429</sup> The CBC cited several unreported Canadian decisions as authority for refusing to read *Clement* as providing the inherent jurisdiction claimed,<sup>430</sup> with a brief note that *Scientology* cuts the other way.<sup>431</sup>

The Crown positioned *Scientology* as the modern day manifestation of *Clement*, rebutting any argument that the common law principle was not valid in a post-Charter constitutional environment.<sup>432</sup> The CBC did not, indeed could not, distinguish *Scientology* from *Bernardo* to the degree that it could distinguish *Clement*.<sup>433</sup> But then, the

427. *Id.* The Crown correctly labeled the distinction a "technicality." Respondent's Factum, *supra* note 403, at 54.

428. CBC Factum, *supra* note 401, at 40. The CBC argued that the order in *Clement* had nothing to do with pretrial publicity, but was designed to prevent witnesses who testified in the first trial from having a report of their testimony to which they could refer before testifying in subsequent trials. Because such orders could not be collaterally attacked as a defense to a contempt conviction, the court's comments about the order's validity was nothing more than *obiter dicta*. In any event, the CBC added, possessing a contemporaneous, fair, and accurate report of judicial proceedings does not constitute contempt of court today. *Id.*

429. *Id.* at 41 (citing *R. v. Vermette* [1988] 1 S.C.R. 985).

430. *Id.* at 41-42 (citing *R. v. Tremblay* (Que. S.C. March 10, 1993) (unpublished); *R. v. Taylor* (B.C.S.C. Oct. 21, 1983) (unpublished); *R. v. Wilson* (Ont. Gen. Div. July 13, 1993) (unpublished); and *R. v. Popowich* (Sask. Q.B. May 28, 1993) (unpublished)).

431. CBC Factum, *supra* note 401, at 42. Also cited for the contrary position is *R. v. Wood* [1983] 20 W.C.B.2d 593 (N.S.S.C., T.D.). *Id.*

432. Respondent's Factum, *supra* note 403, at 53-54.

433. There are distinctions that could be made, most significantly the fact that Bernardo opposed the publication ban. Exactly where in the analysis one deals with Paul Bernardo's opposition to the Crown's application remains an open question. Justice Kovacs treated Bernardo's opposition as a matter of standing and, finding the Crown had an interest in the integrity of the judicial process that was independent of Bernardo's, did not feel compelled to address the matter further. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, paras. 20-50 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>. But Bernardo's opposition was not a capricious waiver of his right to a fair trial; it was a reasoned response to the implications in the press that Bernardo was Homolka's Svengali. Thus, in Bernardo's view, the publication ban was inimical to his fair trial interests insofar as it exacerbated the bias of the potential jury pool against him. The question of Bernardo's opposition goes not merely to standing, but to the reasonableness of the ban under section 1. Of course, that argument is fundamentally incompatible with the position that adequate procedures exist to insulate a jury trial from any prejudicial publicity. There was also some concern that Bernardo's position grew out of a disingenuous ploy to support a later claim that he

reviewing court's task would not be to determine whether *Clement* and *Scientology* were analogous to *Bernardo* or distinguishable; they were, of course, both. Rather, the reviewing court would need to determine whether *Clement* and *Scientology* gave the common law judge a rule, a test, or a framework of sufficient specificity to decide whether the unique facts of the instant case should be brought within it (or whether the interpretation of that rule expanded to encompass the new factual situation).<sup>434</sup> If the reviewing court finds that it did, then the order was lawful, pending the rest of the section 1 analysis.

What then was the rule derived from the common law as perceived by Justice Kovacs, the Crown, and the CBC? And was it sufficient to guide Justice Kovacs past the first obstacle that section 1 would place in his path? Justice Kovacs had looked to Justice Dickson's formulation in *Attorney General of Nova Scotia v. McIntyre*<sup>435</sup> to the effect that "curtailment of public accessibility can only be justified where there is present the need to protect social values of super ordinate [sic] importance," one of which "is the protection of the innocent."<sup>436</sup> This language is elaborated upon in *Scientology's* brief dictum on Charter analysis:

It may be observed, however, that Canadian courts have in previous instances upheld limited publication bans imposed either directly or through the limitation of access to court proceedings provided that a rational basis exists therefor [sic] and the suspension is no more than is reasonably necessary to ensure the protection of values of superordinate importance.<sup>437</sup>

Justice Kovacs also adopted *Scientology's* enumeration of factors to be considered in issuing such a restriction: (1) the availability of a jury trial to the coaccused, (2) the imminence of future proceedings, (3) the nature of the evidence to be disclosed and the likelihood of its

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could not receive a fair trial as a result of media excesses.

434. See Anisman, *supra* note 403, at 24, notes 136-37 (citing *Re Ont. Film & Video Appreciation Soc.*, [1983] 41 O.R.2d 583, 592 (Ont. Div. Ct.)). Justice Kovacs himself recognized that his "inherent jurisdiction" did not allow him to create a new rule of substantive law. *Bernardo*, No. 125/93, O.J. No. 2047, para. 66 (relying on *R. v. Unnamed Person*, [1985] 22 C.C.C.3d 284 (Ont. C.A.)). On that ground, he rejected the request of the Crown and Homolka that he consider the psychological effect of unfettered publicity on innocent relatives and others. *Bernardo*, No. 125/93, O.J. 2047, para. 75.

435. [1982] 1 S.C.R.3d 193, 213 (holding that the public is entitled to inspect a search warrant and the information on which it was granted after the warrant has been executed and after the objects found as a result are brought before a Justice).

436. *Bernardo*, No. 125/93, O.J. 2047, para. 77.

437. *Church of Scientology of Toronto v. R.* (No. 6) [1986] 27 C.C.C.3d 193, 220 (Ont. H.C.).

publication, (4) the adequacy of other procedural mechanisms to ensure a fair trial, (5) and the precise terms of the order sought.<sup>438</sup> Reading Kovacs's assessment of each of these factors, one might disagree with his conclusions, but one would be hard pressed to say he lacked the guidance of legal standards.<sup>439</sup>

In its argument to the Court of Appeal, however, the Crown did not refer to the *Scientology* dictum for a rule, but to the statutory enactment of section 4(2) of the English Contempt of Court Act 1981, which, the Crown implied, codified the common law authority of *Clement*.<sup>440</sup> That provision authorizes a publication ban when the court ascertains a "*real and substantial risk that proceedings would be seriously impeded or prejudiced*" given the totality of circumstances.<sup>441</sup> Asserting that Justice Kovacs's order passed that test, even though he failed to employ the formalized wording, the Crown rejected the CBC's argument that the Crown had to pass the test for an injunction by proving that a fair trial would have been "impossible" without judicial intervention.<sup>442</sup>

In fact, it made little difference whether Justice Kovacs was guided by the dictum in *Scientology*, the contempt formulation put forward by the Crown, or the test for injunctive relief offered by the CBC. Each is a type of balancing test, and all offer sufficient guidance to qualify as "prescribed by law." Whatever differences there may be between the tests have been subsumed in or superseded by the rest of the

438. *Bernardo*, No. 125/93, O.J. 2047, para. 102-108 (citing *Church of Scientology of Toronto*, [1986] 27 C.C.C.3d at 221).

439. Indeed, the ostensible American standard in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976), is no more demanding. See *infra* note 522. The uniquely American hostility to prior restraints, however, leads to a much different result in practice. See, e.g., *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, 125/93 paras. 112-119 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>; Respondent's Factum, *supra* note 403, at 37-38.

440. Respondent's Factum, *supra* note 403, at 52. The Crown also cited *R. v. T.(R.)* [1992] 10 O.R.3d 514 (Ont. C.A.) and *R. v. Poulson*, 1974 Crim. L.R. 141. *Id.*

441. Respondent's Factum, *supra* note 403, at 60. Among the circumstances cited are "the pre-existing publicity, time until trial, the nature of the charge(s) before the court, the likelihood of continued publicity, the view of the co-accused, the adequacy of other trial safeguards, the nature of the proceeding at hand and its relation to the future trial, etc." *Id.*

442. *Id.* The Crown was referring specifically to the CBC's submission to Justice Kovacs prior to Homolka's trial that the Crown had "failed to demonstrate that there existed, in the circumstances of the instant case, a 'real and substantial risk' that a fair trial would be 'impossible' were publication not temporarily deferred." *Id.* at 16. In its submission to the Court of Appeal for Ontario, the CBC used similar language, but in connection with the command in *R. v. Vermette* [1988] 1 S.C.R. 985, 992, that "in deciding the question [whether it will be impossible to conduct a fair trial] one must not . . . rely on speculation." CBC Factum, *supra* note 401, at 25. Because the CBC found no inherent jurisdiction for the order issued in this case, however, it did not deal with this issue in the context of a Section 1 "prescribed by law" analysis.

section one balancing language: "reasonable limits . . . demonstrably justified in a free and democratic society."<sup>443</sup>

## 2. The *Oakes* Test

When the media brought its challenge before the Court of Appeal for Ontario, the prevailing interpretation of section 1's remaining requirements was embodied in the case of *R. v. Oakes*.<sup>444</sup> *Oakes* invalidated a provision of Canada's Narcotic Control Act that shifted to a defendant found in possession of narcotics the burden of proving that such possession was not for the purpose of trafficking.<sup>445</sup> In holding this provision contrary to the presumption of innocence in section 11(d) of the Charter, the Canadian Supreme Court created a two-prong test to determine whether statutory (or common law) rules that infringed upon a Charter right were "reasonable limits . . . demonstrably justified in a free and democratic society":

First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"

Secondly, once a sufficiently significant objective is recognized, then the party invoking [section] 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test". . . . There are . . . three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means . . . should impair "as little as possible" the right or freedom in question. . . . Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance."<sup>446</sup>

Although there could be no dispute that the objective of the publication ban was to reduce the risk that pretrial publicity posed to the fairness of Bernardo's trial, the CBC had argued in terms of risk

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443. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

444. [1986] 1 S.C.R. 103.

445. *Id.* at 142.

446. *Id.* at 138-39 (citations omitted, emphasis in original).

"that a fair trial would be impossible."<sup>447</sup> In contrast, the Crown urged the court to consider the risk "that proceedings would be seriously impeded or prejudiced," a formulation adapted from the British Contempt of Court Act.<sup>448</sup> Justice Kovacs had rejected the CBC position and proceeded to balance the conflicting interests.<sup>449</sup> In its appeals, the media concentrated on three issues: (1) the effect of pretrial publicity, (2) the availability of alternatives to a complete ban, and (3) the effectiveness of the publication ban.<sup>450</sup>

*a. Effect of Pretrial Publicity*

In his order, Justice Kovacs had struggled to reconcile traditional judicial confidence in jurors' objectivity with empirical studies suggesting otherwise.<sup>451</sup> The same conflict appears in the appellate filings.

Relying heavily on the *Vermette* line of cases, the CBC argued that the onus was on Justice Kovacs to show that potential jurors in Bernardo's case would likely have seen prejudicial news reports about Homolka's trial and that jurors' inability to separate the "old news reports from courtroom reality" would destroy their impartiality.<sup>452</sup> Trying to turn a liability into an asset, the CBC said there was no evidence that prospective jurors would distinguish coverage of the Homolka trial from the "avalanche" of other stories about the Bernardo case that would continue to circulate in the community.<sup>453</sup> Similarly, CBC argued that there was no basis to assume that prospective jurors' minds and independence would be overpowered.<sup>454</sup>

Like Kovacs, the Crown looked to social science to establish the "real and substantial" risk required to impose the ban.<sup>455</sup> Citing studies tending to show that "persons with greater knowledge about a case are more likely to be pro-prosecution and that emotional publicity elicits greater negative feelings toward an accused,"<sup>456</sup> the Crown

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447. Respondent's Factum, *supra* note 403, at 16 (characterizing the Submission of Counsel for the CBC, June 29, 1993, at 225).

448. *Id.* at 60.

449. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, para. 135 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>.

450. See *infra* notes 451-80 and accompanying text.

451. *Bernardo*, No. 125/93, O.J. 2047, paras. 122-28.

452. CBC Factum, *supra* note 401, at 22.

453. *Id.* at 23.

454. CBC Factum, *supra* note 401, at 23.

455. Respondent's Factum, *supra* note 403, at 76.

456. *Id.* (citing G.P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUMAN BEHAVIOR 409, 411, 421, 423, 424, 425, 427-30 (1990)).

argued that remedies for these biases have been found generally ineffective.<sup>457</sup> The Crown tried to reconcile the publication ban with judicial expressions of confidence in the jury by characterizing the ban as nothing more than a mechanism for easing the "unreasonable stress of reliance on remedial safeguards alone" by eliminating potentially prejudicial information at its source.<sup>458</sup>

*b. Availability of Alternatives*

In considering alternatives to the publication ban, Justice Kovacs had discussed both change of venue, finding it "problematic in view of the broad publicity across the province," and challenge for cause.<sup>459</sup> Referring again to the *MacGregor* case, Justice Kovacs found challenge for cause less effective in cases of mass publicity "because of the limitations in the procedure."<sup>460</sup> Justice Kovacs did limit the publication ban in scope, by allowing his own remarks on the sentencing to be published, although he did not explain how reporting Homolka's plea, for example, would prejudice Bernardo's trial any more than the public knowledge that sentence was pronounced the same day.<sup>461</sup> Kovacs also limited the ban in time, until the conclusion of Bernardo's trial,<sup>462</sup> apparently never considering whether it might be just as effective to allow publication until some weeks before jury selection. Even though it was unclear whether the publication ban was geographically limited to Ontario by the scope of his jurisdiction, Justice Kovacs did nothing to clarify the issue.

On appeal, the CBC argued that "less drastic means" than a publication ban were available to ensure an impartial trial for Bernardo, but the CBC's analysis was more generic than specific.<sup>463</sup> The CBC argued that any conflict between the strictness of the tests applied by the courts for a change of venue or the right to challenge prospective

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457. Respondent's Factum, *supra* note 403, at 77 (citing E. Greene, *Media Effects on Jurors*, 14 LAW & HUMAN BEHAVIOR 439, 448 (1990)).

458. Respondent's Factum, *supra* note 403, at 78.

459. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, para. 108 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>.

460. *Id.*

461. *Id.* at para. 137-41. Justice Kovacs did cite *Church of Scientology of Toronto v. R.*, 27 C.C.C.3d, 193, 217, for the proposition that it is almost "commonplace" for a court to ban publication of the fact of a guilty plea in such circumstances. *Bernardo*, No. 125/93, O.J. No. 2047, para. 92. But, this proposition hardly explains how such publication would influence a prospective juror who cared enough to have followed this case in the newspapers and knew that Homolka had entered a plea to two counts of manslaughter for which she was summarily convicted and sentenced to twelve years in prison.

462. *Id.* para. 143.

463. CBC Factum, *supra* note 401, at 28-31.

jurors for cause should be resolved in favor of modifying pretrial procedures rather than by infringing on Charter rights.<sup>464</sup> In support, the CBC cited the *Vermette* case for the proposition that "[i]t is only at the stage when the jury is to be selected that it will be possible to determine whether the respondent can be tried by an impartial jury."<sup>465</sup>

In response, the Crown asserted Canada's traditional "disinclination to expand the challenge for cause process into the extensive voir dire proceeding used in the United States," as well as social scientists' doubts as to its effectiveness.<sup>466</sup> The Crown also questioned the effectiveness of changing the trial venue or judicial instruction, finding neither to be very successful in eliminating potential prejudice.<sup>467</sup>

As to the time that was likely to elapse between the Homolka and Bernardo trials, Justice Kovacs had acknowledged that Bernardo's trial might be conducted "well into the future," and there was contemporaneous speculation in the press that Bernardo's trial was eighteen months to two years away.<sup>468</sup> Nevertheless, Justice Kovacs cited cases noting the "tendency of the media to refresh the public's minds just before an interesting or sensational trial" and gave the matter no further attention.<sup>469</sup> The Crown's appellate response cited two more cases for the proposition that extensive publicity could still prejudice a trial even after considerable time had elapsed.<sup>470</sup>

### c. Effectiveness of the Ban

Before *Dagenais*, it was not clear what role, if any, the effectiveness of the ban should play in the section 1 analysis. The *Oakes* formulation referred to a "proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective."<sup>471</sup> However, "effects" in the *Oakes*

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464. *Id.* (citing *R. v. Vermette*, [1988] 1 S.C.R. 985).

465. *Id.* at 29.

466. Respondent's Factum, *supra* note 403, at 82-83.

467. *Id.* at 83, 85-87.

468. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, para. 105 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>.

469. *Id.* (citing *R. v. Lazell* [1988] 48 C.R.R. 258 (H.C.), and *Pilzmaker v. Law Soc'y of Upper Can.* [1989] 70 O.R.2d 126 (Ont. Div. Ct.)).

470. Respondent's Factum, *supra* note 403, at 84 (citing *Hinch v. A.G. Victoria* [1987] 164 C.L.R. 15 (H.C. Aust.), and *A.G. of Man. v. Groupe Quebecor Inc.* [1987] 37 C.C.C.3d 421 (Man. C.A.)). The CBC's factum did not address this issue.

471. *R. v. Oakes* [1986] 1 S.C.R. 103, 139 (S.C.C.).



formulation meant the deleterious impact of a publication ban on a free press, not the effectiveness of the ban in achieving the objective.<sup>472</sup>

Still, the question of effectiveness in keeping the prohibited information from the Canadian public was vigorously debated before the Court of Appeals in factums submitted by intervenor Rogers Cable T.V. Ltd. and the Crown.<sup>473</sup> Rogers, whose cable outlets bring American programming to Ontario, argued that the extensive coverage given to the case by the U.S. media had so altered the situation "that anyone in Canada, with modest effort, now has access to information subject to the publication ban."<sup>474</sup>

While Rogers expends time, money and effort and disrupts its normal programming service in an attempt to comply with the orders, its cable services are only one means by which Canadians can receive information being published and broadcast in the U.S. The learned trial judge noted that, in the Niagara Peninsula, there is "easy access" by cable, satellite dish and antenna reception to U.S. television broadcasts as well as radio reception of U.S. stations and "easily obtainable" American newspapers. Rogers submits that this Honourable Court should take judicial notice of telephone, facsimile and computer access to U.S. media information, as well as the ordinary mails.<sup>475</sup>

The Crown argued that examples submitted by Rogers to support its position were inadmissible and, in any event, provided no evidence regarding the degree to which the coverage actually violated Justice Kovacs's order by reporting prohibited information.<sup>476</sup> Insisting that the gag order was never "considered an impermeable bulwark against some prohibited publication," the Crown urged the court to take no judicial notice of the transborder trafficking in Homolka trial stories.<sup>477</sup>

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472. *Id.* at 138-40 (explaining that, even where the objective is sufficiently important to justify overriding a protected right or freedom, and even where the limitations on that right or freedom are rationally connected to that objective and impair the right or freedom as little as possible, "it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve.").

473. See *infra* notes 474-80 and accompanying text.

474. Factum of the Intervenor, Rogers Cable T.V. Ltd., at 8, Thomson Newspapers Ltd. v. R., (Court of Appeal for Ontario File Nos. C15928, C15934, C15938, C15948) [hereinafter "Factum of the Intervenor"] (brief on file with the *Seattle University Law Review*).

475. *Id.*

476. Respondent's Factum Re Intervention by Rogers Cable T.V. Ltd., at 14-16, Thomson Newspapers Ltd. v. R., (Court of Appeal for Ontario File Nos. C15928, C15934, C15938, C15948) [hereinafter "Respondent's Factum Re Intervention"] (brief on file with the *Seattle University Law Review*).

477. *Id.* at 16.

Rogers's factum also pointed out that the House of Lords had also struck down as futile injunctions against publication of prohibited information when that information was published abroad and made readily available in England.<sup>478</sup> The Crown readily distinguished these *Spycatcher* cases from the case at hand and argued that, in any event, public access to information is not the same as public knowledge.<sup>479</sup> "Acceptable penetration of the relevant population, in any

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478. Factum of the Intervenor, *supra* note 474, at 8-9 (citing *A.G. v. Guardian Newspapers Ltd.* (No. 2), 3 All E.R. 545 (H.L. 1988)).

A series of British cases, known collectively as the *Spycatcher Cases*, addressed *inter alia*, the propriety of an injunction banning newspaper serialization of *Spycatcher*, the autobiography of Peter Wright, a former British security service officer. See Philomena M. Dane, Comment, *The Spycatcher Cases*, 30 OHIO ST. L.J. 405, 405-06 (1989). Upon learning that Wright planned to publish his autobiography in Australia, the Attorney General brought action in New South Wales against Wright and the publishers to restrain the publication based on violation of the Official Secrets Act 1911. *Id.* at 406-07. While that litigation was pending, interlocutory orders were obtained against two newspapers, the *Observer* and the *Guardian*, which published articles in June 1986 on the impending trial, including an outline of some of the author's claims in his unpublished manuscript. *Id.* at 408.

Those injunctions banned disclosure or publication of any information obtained by Wright in his position as a member of the British secret service. *Id.* at 407. The *Sunday Times* purchased the serialization rights and published the first excerpt of the proposed book on July 12, 1987. *Id.* at 408. On July 13, the book was published in the United States. The Attorney General secured an interlocutory injunction in England preventing *The Sunday Times* from publishing further portions of the book while the trial was pending. *Id.* at 408-09.

The Chancery Division trial judge (*A.G. v. Guardian Newspapers*, 3 All E.R. 545 (1987)) discharged the interlocutory injunctions, holding that the Attorney General was not entitled to injunctions against the *Guardian* and the *Observer* because the book had been published overseas, and thus the damage the injunctions sought to prevent had already been realized.

The Attorney General's appeal was dismissed by the Court of Appeal (*A.G. v. Guardian Newspapers Ltd. and Others* (No. 2); *A.G. v. Observer Ltd. and Others*; *A.G. v. Times Newspapers Ltd. and another*, 3 All E.R. 545 (1988)), and the House of Lords (*A.G. v. Guardian Newspapers*, 3 All E.R. 545 (1989)).

479. Respondent's Factum Re Intervention, *supra* note 474, at 16-19. The Crown quoted Lord Brandon's observation in *A.G. v. Guardian Newspapers Ltd.* (No. 1), 3 All E.R. 343, 349 (1987):

In relation to both arguments it is, I think, putting the case too high to say that the matters contained in *Spycatcher* have become public knowledge in the United Kingdom. A limited section of the public, who feel a strong motivation to acquire knowledge of the matters concerned, can no doubt obtain access to a copy of the book published in America and not prohibited from being imported here. But this does not mean that the matters concerned are already within the knowledge of the public as a whole. If they were, it is difficult to see why the newspapers should be so bent on publishing them, and so incensed at being restrained even temporarily from doing so.

*Id.* at 17. Noted also is Lord Templeman's opinion in *A.G. v. Guardian Newspapers Ltd.*, 3 All E.R. 343, 357 (H.L. 1987):

I reject the argument that the law will appear ridiculous if it imposes a restriction on mass circulation when any individual member of the public may obtain a copy of the *Spycatcher* from abroad. The court cannot exceed its territorial jurisdiction but the court can prevent the harm which will result from mass circulation within its own jurisdiction.

set of circumstances, insofar as public exposure to the facts in question, is a question of degree."<sup>480</sup> Although none of the media's three substantive points was ever resolved at the appellate level, the question of effectiveness of a publication ban was central to the changes that *Dagenais* wrought in Canadian media law.

C. *Dagenais v. Canadian Broadcasting Corp.*<sup>481</sup>

While there is no hard evidence that Chief Justice Lamer had the Kovacs order in mind when he wrote the lead opinion in *Dagenais*, it would be absurd to suppose that the nation's highest tribunal was not keenly aware of the most highly publicized murder case waiting in the wings. The assumption that the Supreme Court was at least influenced by the public and media reaction to that case is reinforced by Chief Justice Lamer's reference to computer-assisted communications technology, which played no role in the *Dagenais* facts.<sup>482</sup>

Whatever the influence of the Kovacs order, the news coverage accompanying the *Dagenais* decision on December 8, 1994, was replete with such words as "landmark," "historic," and "unprecedented."<sup>483</sup> "This is the dawn of a new era," said Stuart Robertson, counsel for the Canadian Daily Newspaper Association,<sup>484</sup> "[i]t's a very important moment in the history of our court system in Canada. It is going to have enormous impact."<sup>485</sup>

"I think this is the most dramatic decision that I've seen from this court under the Charter of Rights with respect to freedom of expression," said *Toronto Star* lawyer Bert Bruser.<sup>486</sup>

It recognizes the public's right to know is at least as important as an individual's right to a fair trial. That is a dramatic change from the way the courts have dealt with this conflict over the past 100 years. It means it will be harder now for people to get publication bans in criminal trials. That is good as far as the public's right to know what is going on. This is a huge victory for the public.<sup>487</sup>

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*Id.* at 16-17.

480. Respondent's Factum Re Intervention, *supra* note 476, at 17.

481. [1994] 3 S.C.R. 835.

482. *Id.* at 886. See *infra* text accompanying note 525.

483. See, e.g., David Vienneau, *Muzzling of Media by Courts Cut Back*, *TORONTO STAR*, Dec. 9, 1994, at A1.

484. *Id.*

485. *Id.*

486. *Id.*

487. *Id.*

In that sweeping 6-3 decision, the Court discarded traditional Canadian preference for fair trial over free press rights and for preventing pretrial publicity over insulating defendants from the publicity's adverse effects.<sup>488</sup> While sidestepping the question of whether the Charter applies directly to court orders, including publication bans, the *Dagenais* Court applied a Charter analysis to the common law rule under which publication bans were ordered and found that rule inadequate.<sup>489</sup> In doing so, the *Dagenais* Court expounded a new common law rule that conformed with Charter principles. It ordered judges to balance the deleterious effects on free expression of a proposed publication ban, not merely against the objective of preserving a fair trial, but also against its salutary effects, that is, against the effectiveness of the ban in achieving its objective.<sup>490</sup>

Procedurally, the Court ensured that the media would have standing to challenge a proposed publication ban before it is imposed and some avenue for appealing an adverse decision.<sup>491</sup> For the media challenging the Kovacs order, the procedural rulings in *Dagenais* meant dismissal of their appeals before the Court of Appeal for Ontario for lack of jurisdiction and subsequent reapplication to the Supreme Court of Canada.

In *Dagenais*, the Supreme Court reviewed the Court of Appeal for Ontario's affirmance of a ban imposed nationwide by a justice of the Ontario Court of Justice (General Division) on the broadcast of a miniseries entitled "The Boys of St. Vincent," a fictional account of sexual and physical abuse of children in a Catholic institution.<sup>492</sup> The ban had been imposed pending completion of the trials of Lucien Dagenais and three other Christian Brothers who were charged with sexual and physical abuse of young boys attending the Catholic training schools where they were teachers.<sup>493</sup> When the Canadian Broadcasting Corp. and the National Film Board of Canada challenged the *Dagenais* ban, the Court of Appeal for Ontario limited the scope of the ban geographically, and reversed that part of the order barring

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488. See *infra* notes 507-09 and accompanying text.

489. *Id.*

490. See *infra* notes 510-13 and accompanying text.

491. See *infra* notes 502-03 and accompanying text.

492. *Dagenais v. Canadian Broad. Corp.* [1994] 3 S.C.R. 835, 851-53.

493. *Id.* In issuing the order, Justice Gotlib said she was "satisfied that the harm that would be caused by the showing of this particular film before the jury trials of the three remaining accused persons would be such that the possibility of impartial jury selection virtually anywhere in Canada would be seriously compromised." *Id.* at 854.

any publicity about either the miniseries or the ban, but affirmed in all other respects.<sup>494</sup>

Writing for the Supreme Court, Chief Justice Lamer found that resolution of the *Dagenais* case turned on two issues: What courts have jurisdiction to hear a third-party challenge to a publication ban imposed by a provincial or superior court judge, under common law or legislated discretionary authority, in a criminal proceeding? And on what grounds should a publication ban be ordered by a judge under discretionary authority or altered or set aside by a higher court?<sup>495</sup> Chief Justice Lamer pointedly excluded from his analysis publication bans required by common law or statute.<sup>496</sup>

On the jurisdictional question, Chief Justice Lamer found that although the Criminal Code offered the media no direct appeal from a publication ban imposed by superior court judges, neither did it limit the Supreme Court's jurisdiction to grant leave to appeal under section 40(1) of the Supreme Court Act.<sup>497</sup> Lamar said that relying on the Supreme Court to grant leave to appeal under Section 40(1) of the Supreme Court Act would not provide the "optimal protection" for freedom of expression that an appeal of right would afford; it would be the "least unsatisfactory avenue" for such challenges, absent a better

494. *Dagenais v. Canadian Broad. Corp.* [1992] 12 O.R.3d 239, 247-48 (Ont. C.A.) (Rev. [1994] 34 C.R.4th 269 (S.C.C.)).

495. *Dagenais v. Canadian Broad. Corp.* [1994] 3 S.C.R. at 856.

496. *Id.* at 856-57.

497. *Id.* at 858-60. Chief Justice Lamer asserted that section 674 of the Criminal Code ("No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offenses.") does not limit section 40(1) of the Supreme Court Act:

40.(1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

*Id.* at 861.

Finding no limitation in subsection (3), which deals only with appeals from acquittal or conviction, Chief Justice Lamer said that a publication ban can be seen as a final order within the meaning of section 40(1), establishing jurisdiction. *Id.* In her dissenting opinion, Justice L'Heureux-Dubé took issue with this characterization, calling publication bans interlocutory orders, at least with respect to the accused. *Id.* at 895, 904-05. (L'Heureux-Dubé, J., dissenting). Section 40(1), she said, "was not, in my opinion, intended to override the principle against interlocutory criminal appeals." *Id.* at 906 (L'Heureux-Dubé, J., dissenting).

one created by legislation.<sup>498</sup> Where the publication ban is imposed by a provincial court judge, the Chief Justice prescribed an application for certiorari to the superior court, from which appeals to the Court of Appeal for Ontario and then to the Supreme Court of Canada would lie.<sup>499</sup> He also enlarged the remedial powers of certiorari, traditionally limited to quashing an order, to include such remedies as the court considers appropriate and just in the circumstances.<sup>500</sup>

In practice, then, Chief Justice Lamer said a motion requesting a publication ban should be made by the Crown and/or the accused before the trial judge, if known, or a judge in the court where the case will be heard, if established, or a superior court judge.<sup>501</sup> The motion must be heard in the absence of the jury, if empaneled, and the court should give notice and standing to media opposing the ban in accordance with provincial rules of criminal procedure and relevant case law.<sup>502</sup> If, notwithstanding the media's participation the court imposes a publication ban, the media should apply to the Supreme Court of Canada for leave to appeal a superior court order, or for certiorari to the superior court from a provincial court.<sup>503</sup>

In finding these avenues of appeal, the Chief Justice was able to avoid one of the open questions of post-Charter jurisprudence: whether the Charter applies directly to court orders.<sup>504</sup> But he

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498. *Id.* at 861-62.

499. *Id.* at 858. Chief Justice Lamer pointed out that provincial superior courts have jurisdiction to hear applications for certiorari against provincial court judges for errors of law on the face of the record. *Id.* at 864-65. "Since the common law rule does not authorize publication bans that limit *Charter* rights in an unjustifiable manner, an order implementing such a publication ban is an error of law on the face of the record." *Id.* at 865.

500. *Id.* at 866 (quoting to section 24(1) of the Charter: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.") *Id.* at 867.

501. *Id.* at 870.

502. *Id.* at 868.

503. *Id.* at 872. While that was not done in *Dagenais*, the Court granted the CBC leave to appeal *proprio motu*, *nunc pro tunc*, *ex post facto* (of its own motion, now as of the previous date, for something done after) because the CBC could not have known the proper procedure and "because the issue of publication bans is of national importance." *Id.* at 874.

504. *Id.* at 866. Chief Justice Lamer asserted that section 24(1) of the Charter "might" be "available" to provide an appellate route if a challenge to a publication ban could not be framed in terms of an error of law, precluding certiorari or Supreme Court appeal. *Id.* at 867-68. Had that been the case, he would have been required to decide whether the Charter applies directly to court orders. Since the challenge could be so framed, however, he and four colleagues could avoid the issue for now, but the separate opinions suggest that the court is sharply divided on the issue. Justice McLachlin, who supported Chief Justice Lamer on both jurisdictional and substantive issues, nevertheless wrote to insist that "court orders in the criminal sphere which affect the accused's *Charter* rights or procedures by which those rights may be vindicated must

answered the question for all practical purposes by insisting that no common law rule conferring discretion upon a judge to impose a publication ban can confer the power to infringe the Charter.<sup>505</sup> "Discretion must be exercised within the boundaries set by the principles of the *Charter*; exceeding these boundaries results in a reversible error of law."<sup>506</sup>

The common law rule governing publication bans, Chief Justice Lamer said, placed the burden on "those seeking a ban to demonstrate that there is a real and substantial risk of interference with the right to a fair trial."<sup>507</sup> Acknowledging that the rule as stated afforded some protection to freedom of expression, at least from publication bans imposed capriciously or in response to "merely speculative concerns," he concluded that it did not provide enough protection in the post-Charter era:

The pre-*Charter* common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban.<sup>508</sup> In my view, the balance this rule strikes is inconsistent with the principles of the *Charter*, and in particular, the equal status given by the Charter to [sections] 2(b)

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themselves conform to the Charter." *Id.* at 944 (McLachlin, J., concurring). Justice LaForest, who dissented on jurisdictional grounds, agreed with Chief Justice Lamer on the merits and with Justice McLachlin on application of the Charter. *Id.* at 893-94 (LaForest, J., dissenting). Justice Gonthier, who supported Chief Justice Lamer's jurisdictional solution, applied section 1 of the Charter to reach the opposite conclusion on the merits, but was unwilling to impose that analysis on the lower courts. *Id.* at 931 (Gonthier, J., dissenting). And Justice L'Heureux-Dubé, who disagreed with Lamer on both jurisdiction and the merits, argued forcefully that applying the Charter to court orders could subject all private litigation to Charter analysis. *Id.* at 908-12 (L'Heureux-Dubé, J., dissenting). Relying on *RWDSU v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573, L'Heureux-Dubé cited her own decision in *Young v. Young* [1993] 4 S.C.R. 3, 90-91: "the Charter applies to legislative, executive and administrative branches of government but does not apply to judicial orders made in the resolution of private disputes." *Id.* at 909 (L'Heureux-Dubé, J., dissenting). Compare *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that judicial enforcement of state libel law is state action subject to constitutional scrutiny). To L'Heureux-Dubé, the CBC's Charter rights were fully vindicated by the opportunity to be heard before the publication ban was issued. *Id.* at 898 (L'Heureux-Dubé, J., dissenting). See also Anisman, *supra* note 403, at 26-27.

505. *Dagenais* [1994] 3 S.C.R. at 874-75.

506. *Id.* at 874.

507. *Id.*

508. Indeed, in its decision affirming the publication ban, the Court of Appeal for Ontario drew on pre- and post-Charter cases to find that Canadian courts have consistently held the right to a fair trial paramount over freedom of the press. *Canadian Broad. Corp. v. Dagenais* [1992] 12 O.R.3d 339, 347-48 (Ont. C.A.). And Justice Kovacs cites case after case holding that "the right of a fair and un-prejudiced trial has paramountcy over the right of freedom of expression, if the two conflict." *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, paras. 94-99 (Ont. Gen. Div.) (unpublished) (visited July 5, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>.

and 11(d). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by [section] 11(d) over those protected by [section] 2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.<sup>509</sup>

Accordingly, Chief Justice Lamer found it necessary to reformulate the common law rule in a manner reflecting the principles of the *Charter*.<sup>510</sup> Specifically:

A publication ban should only be ordered when:

- (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
- (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.<sup>511</sup>

A judge imposing a ban that failed to meet that standard, Lamer said, would have committed an error of law and a challenge to the order on that basis should be successful.<sup>512</sup>

Parsing the rule still further, Chief Justice Lamer held that the first part of the test would be passed only if "(1) the ban was as narrowly circumscribed as possible (while still serving the objectives); and (2) there were no other effective means available to achieve the objectives."<sup>513</sup> Acknowledging that the *Dagenais* ban was directed toward preventing a real and substantial risk to the fairness of the trials, he concluded that the original ban was "far too broad" in both substantive and geographical scope.<sup>514</sup> Notwithstanding that finding, and the fact that the ban had already expired, Chief Justice Lamer briefly considered the alternatives available.<sup>515</sup> In so doing, he took yet another step away from traditional Canadian jurisprudence and toward the American model.

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509. *Dagenais* [1994] 3 S.C.R. at 877.

510. *Id.* at 878.

511. *Id.*

512. *Id.*

513. *Id.* at 880-81.

514. *Dagenais* [1994] 3 S.C.R. 835, 881.

515. *Id.*



The Chief Justice found that reasonable alternatives to the ban were, in fact, available to a judge.<sup>516</sup> Among those alternatives were "adjourning trials, changing venues, sequestering jurors, allowing challenges for cause and *voir dire*s during jury selection, and providing strong judicial direction to the jury."<sup>517</sup> He added that sequestration and judicial direction were available for the *Dagenais* jury, already five weeks into the trial when the publication ban was issued, and that only sequestration was not available to the other defendants, whose juries had not yet been empaneled.<sup>518</sup>

The list of alternatives that Chief Justice Lamer cited is by no means remarkable; it closely tracks a similar list in the U.S. Supreme Court's decision in *Nebraska Press Association v. Stuart*.<sup>519</sup> What is remarkable is the absence in his opinion of any negative reference to the onerous burden of some of these alternatives, particularly sequestration and rigorous *voir dire*. The disfavoring of such measures is typically raised to distinguish the Canadian from the American legal culture and to justify the Canadian preference for gag orders.<sup>520</sup>

516. *Id.*

517. *Id.*

518. *Id.*

519. 427 U.S. 539, 563-64 (1976) (reiterating alternatives discussed with "obvious approval" in *Sheppard v. Maxwell*, 384 U.S. 333, 357-362 (1966):

(a) change of trial venue to a place less exposed to the intense publicity that seemed imminent . . . ; (b) postponement of the trial to allow public attention to subside; (c) searching questioning of prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court. Sequestration of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths.)

(citations omitted).

520. That position was amply expounded in Justice Gonthier's dissenting opinion which emphasized the "distinct costs and burdens" those alternatives impose. *Dagenais v. Canadian Broad. Corp.* [1994] 3 S.C.R. 835, 927 (Gonthier, J., dissenting). Justice Gonthier, whose analysis tracks § 1 of the Charter and the *Oakes* test, would have the trial judge do a comparative analysis of effectiveness, feasibility and cost of all possible measures. *Id.* at 923, 927 (Gonthier, J., dissenting). According to Justice Gonthier, adjourning trials or changing venues imposes obvious costs for all concerned and raises the possibility of excessive delay. *Id.* at 927. Sequestration is a "very exceptional remedy," which another justice had called a "monstrous suggestion" given the heavy burden it imposes on those citizens contributing most to the fairness of the trial. *Id.* Strong judicial direction may not be considered adequate where, as in three of the cases here, the trial judge has not had the opportunity to observe the conduct of the jury throughout the trial. *Id.* And extensive challenges for cause and *voir dire* during jury selection can, as in the United States, result in a grueling and extended jury selection process. *Id.* at 927-28. "[S]uch a practice does not reflect the tradition in this country," Justice Gonthier said, acknowledging an exception in the recent case of *R. v. Parks* [1993] 15 O.R.3d 324 (Ont. C.A.). *Id.* at 928. "The exceptional concern to prevent racial discrimination from interfering with an accused's right to a fair trial [in *Parks*] does not justify sweeping away the Canadian tradition of minimal challenge nor does it

Having reached the conclusion that the publication ban was unnecessary in this case, Chief Justice Lamer found no need to engage in the balancing prescribed by his reformulated rule.<sup>521</sup> He did, however, elaborate on how that balancing should occur. Expressing concern about the efficacy of some publication bans, he proceeded to bring the Canadian rule closer to the American model than it had ever been.<sup>522</sup>

The Chief Justice began by expressing doubt that jurors are always adversely influenced by pretrial publicity and by reaffirming his belief in their capability to follow instructions from judges and ignore information not presented to them at trial.<sup>523</sup> He acknowledged that sustained pretrial publicity might not always be overcome by judicial instruction,<sup>524</sup> but a publication ban's potential for stanching that publicity is another question altogether, especially in view of technological advances in communications media:

The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and shortwave radios. *It has also been reduced by the advent of information exchanges available through computer networks.* In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing.<sup>525</sup>

According to Chief Justice Lamer, the efficacy of a publication ban should be considered at all stages in the analysis, but especially in

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justify the potentially huge costs associated with more extensive challenge." *Id.* (Gonthier, J., dissenting). See also Respondent's Factum, *supra* note 403, at 72-86.

521. *Dagenais* [1994] 3 S.C.R. at 880.

522. In *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 562, Chief Justice Burger prescribed an analysis of the evidence before the trial judge when the order was entered to determine "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) *how effectively a restraining order would operate to prevent the threatened danger*" (emphasis added). Indeed, the *Nebraska Press* case itself turned in part on the probable ineffectiveness of the gag order in the small town where the original crime occurred. "It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts." *Id.* at 567.

523. *Dagenais* [1994] 3 S.C.R. at 884-85 (citing *Ex parte Telegraph Plc.* 2 All E.R. 971, 978 (H.L. 1993); *R. v. Corbett* [1988] 1 S.C.R. 670, 692-93; and *R. v. Vermette* [1988] 1 S.C.R. 985, 993-94).

524. *Dagenais*, [1994] 3 S.C.R. at 886.

525. *Id.* (emphasis added).

balancing the salutary and deleterious effects of the ban.<sup>526</sup> "If the actual beneficial effects of publication bans are limited," he said, "then it might well be argued in some cases that the negative impact the ban has on freedom of expression outweighs its useful effects."<sup>527</sup>

Comparing his analytical approach to that of Chief Justice Dickson in the *R.V. Oakes* case,<sup>528</sup> Chief Justice Lamer pointed out that *Oakes* required a balance between a publication ban's objective and its deleterious effects where imposition of the ban will result in the full, or nearly full, realization of that objective.<sup>529</sup> Lamer, however, went a step further to suggest that where the ban will only partially achieve its objective, *Oakes* requires that both the underlying objective and the salutary effects be proportional to the deleterious effects the measure has on fundamental rights and freedoms.<sup>530</sup> Thus,

A legislative objective may be pressing and substantial, the means chosen may be rationally connected to that objective, and less rights-impairing alternatives may not be available. Nonetheless, even if the importance of the *objective itself* (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual *salutary effects* of the legislation will not be sufficient to justify these negative effects.<sup>531</sup>

If so, Chief Justice Lamer said, a measure will not be "reasonable and demonstrably justified in a free and democratic society" as required by section 1 of the Charter.<sup>532</sup> "A similar view of proportionality must inform the common law rule governing publication bans," he added, suggesting that "when a ban has a serious deleterious effect on freedom of expression and has few salutary effects on the fairness of a trial, the ban will not be authorized at common law."<sup>533</sup>

526. *Id.* at 886-87.

527. *Id.* at 887.

528. [1986] 1 S.C.R. 103. Chief Justice Lamer refers specifically to Chief Justice Dickson's statement in *Oakes* that "[e]ven if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve." Dagenais [1994] 3 S.C.R. at 887 (quoting *R. v. Oakes* [1986] 1 S.C.R. at 140).

529. *Dagenais v. Canadian Broad. Corp.* [1994] 3 S.C.R. at 887.

530. *Id.* Whether *Oakes* really went that far is debatable. That it did not is suggested by Chief Justice Lamer's suggestion that the third prong of the *Oakes* test be rephrased as follows: "there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be proportionality between the deleterious and salutary effects of the measures." *Id.* at 889.

531. *Dagenais v. Canadian Broad. Corp.* [1994] 3 S.C.R. at 887-88.

532. *Id.* at 889.

533. *Id.*

With a final reminder that a fair trial is no less a fundamental right than free expression, Chief Justice Lamer summarized his "general guidelines for practice"<sup>534</sup> and set aside the *Dagenais* publication ban.<sup>535</sup>

He also effectively ended the legal challenge to Justice Kovacs's ban on publishing details of Karla Homolka's trial, even though the *Dagenais* decision appeared to resolve the questions at issue in that case in the media's favor. Since *Dagenais* vested exclusive jurisdiction to hear such appeals in the Supreme Court, the Court of Appeal had to dismiss the action. The Supreme Court probably refused to hear the appeal because the publication ban would expire before the court could hear the case. Thus, all that remains is to evaluate the significance of

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534. *Id.* at 889-91.

In order to provide guidance for future cases, I suggest the following general guidelines for practice with respect to the application of the common law rule for publication bans:

- (a) At the motion for the ban, the judge should give the media standing (if sought) according to the rules of criminal procedure and the established common law principles with regard to standing.
- (b) The judge should, where possible, review the publication at issue.
- (c) The party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation. The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial is seeking to use the power of the state to achieve this objective. A party who uses the power of the state against others must bear the burden of proving that the use of state power is justified in a free and democratic society. Therefore, the party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and there is a proportionality between the salutary and deleterious effects of the ban. At the same time, the fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied.
- (d) The judge must consider all other options besides the ban and must find that there is no reasonable and effective alternative available.
- (e) The judge must consider all possible ways to limit the ban and must limit the ban as much as possible; and
- (f) The judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate.

*Id.* at 890-91.

535. *Id.* at 891-92. In the companion case, *R. v. S.(T.)* [1994] 3 S.C.R. 952, also decided on December 8, 1994, the Court dismissed the CBC's appeal of an order issued by a provincial youth court judge banning publication of evidence and proceedings at a juvenile offender's trial until the related trials of other accused were completed. *Id.* at 953. Following the *Dagenais* decision, the court held that neither the Court of Appeal for Saskatchewan nor the Supreme Court had jurisdiction to hear the CBC's challenge directly. *Id.* Relief could come only through application for certiorari to the superior court of the province. *Id.* at 953-54 (L. Heureaux-Dubé, J.).

this episode to the evolution of Canadian law, to the mass media in both the U.S. and Canada, and to the question of Canadian sovereignty in the face of alleged American cultural and technological imperialism.

#### IV. IMPACT

Justice Kovacs's publication ban, the press's and public's reaction to it, and the Canadian Supreme Court's *Dagenais* decision taken together raise a number of interesting and important issues. This section discusses some of those issues, exploring the impact of this episode on Canadian law, the media, and national sovereignty.

##### A. On Canadian Law

In setting out new procedural and substantive law governing publication bans in post-Charter Canada, *Dagenais* was properly hailed as a landmark decision. The true importance of any precedent, of course, can only be measured by its application in subsequent cases, and although it is still rather early for such an analysis, a few cases have already adopted its formulation of the section one balancing test as outlined in the *Oakes* decision.<sup>536</sup>

Before turning to one of them, however, we should note that *Dagenais* does not question for a moment the common-law authority of Canadian judges to impose publication bans when, in their discretion, such bans are appropriate. The "prescribed by law" prong of the *Oakes* test, which figured so prominently in the CBC's appeal of the Kovacs order, is never mentioned in *Dagenais*, not even when Chief Justice Lamer looks to *Oakes* for support. It remains to be seen whether that issue will be addressed when and if the Supreme Court is forced to decide whether the Charter applies directly to court orders.

It also bears pointing out that despite the apparent parallels between the *Dagenais* case and the *Nebraska Press* case, significant differences between the Canadian and American approaches to publication bans remain. Chief Justice Lamer derived his effectiveness test from Canadian, not from American precedents.<sup>537</sup> In fact,

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536. See *supra* notes 534-35 and accompanying text and *infra* notes 537-45 and accompanying text.

537. *Dagenais* [1994] 3 S.C.R. at 884-90. In particular, he cited *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* [1990] 1 S.C.R. 1123 (considering whether the obtrusiveness involved in enforcing legislation against street solicitation could be justified by the resulting decrease in that social nuisance), and *R. v. Hess* [1990] 2 S.C.R. 906 (holding that the potential benefits of imposing absolute criminal liability for having sexual intercourse with a female person under age 14 were far too speculative to justify the possibility of life imprisonment for one who is mentally innocent). *Id.* at 888-89. He might also have referred to the Law

Lamer went out of his way to distinguish the Canadian and American views of the free press/fair trial conflict, rejecting the notion that publication ban challenges should "always be seen as a clash between two titans."<sup>538</sup>

Perhaps the most important difference between *Dagenais* and *Nebraska Press* lies in the requisite degree of certainty that a trial will be compromised. There is an inherent contradiction in trying to prove (or disprove), with abstract ideas alone, that an acknowledged risk is "real and substantial" in particular circumstances. Both sides are necessarily dealing with news stories that have not yet been written and with jurors who have not yet been chosen. Existing empirical evidence is inconclusive.<sup>539</sup> Thus, any risk to a fair trial must be speculative, no matter how pervasive the publicity.

In the United States, that appears to end the inquiry. In *Nebraska Press Association v. Stuart*,<sup>540</sup> Chief Justice Burger found the trial judge "justified in concluding that there would be intense and pervasive pretrial publicity concerning this case."<sup>541</sup>

He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only "a clear and present danger that pre-trial publicity *could* impinge upon the defendant's right to a fair trial." [emphasis added by Burger] His conclusion as to the impact of such publicity on prospective

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Reform Commission of Canada's conclusion that the only constitutionally sound intrusions on the absolute freedom of the media are "those constituting a greater contribution to democracy than is made by the media freedom that is consequently lost. . . ." LAW REFORM COMMISSION OF CANADA, WORKING PAPER 56, PUBLIC AND MEDIA ACCESS TO THE CRIMINAL PROCESS 13 (1987).

538. *Dagenais v. Canadian Broad. Corp.* [1994] 3 S.C.R. at 881. Chief Justice Lamer said the "clash model" was "more suited to American than to Canadian jurisprudence, since the American Constitution has no equivalent of s. 1 of our *Charter*." *Id.* at 882. Moreover, the two rights are not always in conflict. *Id.* He noted that publicity sometimes serves important interests in the fair trial process, including the accused's interest in public scrutiny of the process and its participants. *Id.* Finally, the analysis of publication bans should be much richer than the clash model suggests, he said, enumerating several salutary and deleterious effects of imposing or not imposing such bans. *Id.* at 882-83.

539. See, e.g., Robb M. Jones, *The Latest Empirical Studies on Pretrial Publicity, Jury Bias, and Judicial Remedies not Enough to Overcome the First Amendment Right of Access to Pretrial Hearings*, 40 AM. U. L. REV. 841 (1991) (pointing out that the studies typically do not address the effect of actual media coverage on jurors, but rather focus on the effect that certain facts, if known by jurors, may have on jury deliberations).

540. 427 U.S. 539.

541. *Id.* at 562-63.

jurors was of necessity speculative, dealing as he was with factors unknown and unknowable.<sup>542</sup>

Chief Justice Burger found the mere possibility of prejudice inadequate to overcome the First Amendment's presumption against prior restraint, and such publication bans are all but impossible in the United States.<sup>543</sup>

In Canada, the analysis continues. However sharply *Dagenais* reduces the discretion of the Canadian trial judge to impose publication bans, it does not demand a showing that pretrial publicity will inevitably prejudice the defendant's trial. Both Chief Justice Burger and Justice Gotlib found that publicity threatened the fairness of the defendant's respective trials.<sup>544</sup> But while such a finding was inadequate for Chief Justice Burger, it prompted Chief Justice Lamer to move on to the next step. Without further explanation, he found that Justice Gotlib's ban "was clearly directed toward preventing a real and substantial risk to the fairness of the trial of the four accused."<sup>545</sup>

Chief Justice Lamer strongly endorsed the *Corbett* and *Vermette* cases. He expressed his own doubts that jurors are "always adversely influenced by publications" and his own conviction that jurors who may be adversely influenced are "capable of following instructions from trial judges and ignoring information not presented to them in the course of the criminal proceedings."<sup>546</sup> However, he added a cautionary paragraph that seemed to speak directly to Justice Kovacs's publication ban in the *Homolka* trial:

These observations are particularly apt in a case, such as this, in which the publication ban relates to identifiable and finite sources of pre-trial publicity. More problematic is the situation in which there is a period of sustained pre-trial publicity concerning matters that will be the subject of the trial. In such circumstances, the effect of instructions is considerably lessened. Impressions may be created in the minds of the jury that cannot be consciously dispelled. The jury may at the end of the day be unable to separate the

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542. *Id.*

543. See, e.g., LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 858-59 (2d ed. 1988). The court's "apparent confidence" that alternatives to prior restraints on the media would adequately deter any adverse impact of publicity in a particular trial suggests the *Nebraska Press* decision acts as "a virtual bar to prior restraints" on the press. *Id.*

544. See *supra* note 493 and text accompanying notes 542-43.

545. *Dagenais* [1994] 3 S.C.R. at 880.

546. *Id.* at 884.

evidence in court from information that was implanted by a steady stream of publicity.<sup>547</sup>

If the Court found that the showing of the fictional movie, "The Boys of St. Vincent" anywhere in Ontario posed a "real and substantial risk" to the fairness of the trials of the four Christian Brothers charged with similar offenses, then the Court would likely find that the publication of evidence presented in Karla Homolka's trial posed at least as real and substantial a risk to the fairness of Paul Bernardo's trial. *Dagenais* may have altered the balance between free press and fair trial interests in Canada, but it still falls far short of embracing the nearly absolute American aversion to prior restraints on media coverage of criminal trials.<sup>548</sup>

This may be best illustrated in a case decided by the Supreme Court of Canada nearly two years after the *Dagenais* decision. In *Canadian Broadcasting Corp. v. New Brunswick*,<sup>549</sup> the *Dagenais*-prescribed Charter analysis was explicitly invoked to strike down a lower court order excluding the press and the public from parts of a sentencing proceeding in a sexual assault case during which specific acts committed by the defendant were to be discussed.<sup>550</sup> The Supreme Court rejected the CBC's facial challenge to the legislation authorizing the exclusion,<sup>551</sup> but struck down the order nevertheless because it was "not necessary to further the proper administration of justice and the deleterious effects of the order were not outweighed by its salutary effects."<sup>552</sup>

The case began when the CBC had challenged the order under section 2(b) of the Charter before the Court of Queen's Bench of New

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547. *Id.* at 885-86. In the Bernardo trial, 980 prospective jurors were summoned to a courtroom set up in the Royal York Hotel, where the judge explained that the trial would last an estimated four months and that the jurors would be required to view very explicit photographs and videos of sexual acts. Neil Vidmar, *Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury*, 79 JUDICATURE 249, 250-51 (1996). Those who believed they could serve nevertheless were subjected to what was, by Canadian standards, an unusually searching voir dire. "With some persons excused for hardship, others excused for bias, and others rejected through peremptories, 225 veniremen were called in the Bernardo case before a jury was seated. The total jury selection process took five days, an extraordinarily lengthy proceeding for a Canadian trial." *Id.* at 252.

548. See Ann Riehle, Comment: *Canada's "Barbie and Ken" Murder Case: The Death Knell of Publication Bans?*, 7 IND. INT'L & COMP. L. REV. 193, 212 (1996) (concluding that *Dagenais* does not go far enough in ending Canadian publication bans).

549. [1996] 3 S.C.R. 480 (S.C.C.).

550. *Id.*

551. *Id.* at 523 (finding Canadian Criminal Code, section 486(1), the same provision purportedly authorizing Justice Kovacs's publication ban, constitutionally valid).

552. *Id.*



Brunswick.<sup>553</sup> That court held that since section 486(1) limits or prohibits the right of the public and the press to gather and publish information about court proceedings, section 486(1) constituted an infringement on freedom of the press protected by section 2(b).<sup>554</sup> Applying a pre-*Dagenais* section 1 analysis, however, the court held that:

There exists a rational connection between the section and the objective, the section impairs the freedom as little as possible and there is some balance in the importance of the objective and the injurious effect of the section.<sup>555</sup>

The court then found that, although the case was "borderline," the trial judge's decision to invoke section 486 (1) was within his discretion.<sup>556</sup> "[A] Court of Appeal should not substitute its judgment for that of a judge who felt compelled to exercise discretion as did the judge in the present case."<sup>557</sup> A three-judge panel of the New Brunswick Court of Appeal agreed with the court below in all essential aspects of the decision, including the wide latitude given the trial judge.<sup>558</sup>

553. See *Canadian Broad. Corp. v. New Brunswick* [1993] 143 N.B.R.2d 174.

554. *Id.* at 178.

555. 3 S.C.R. 480, 488 (quoting *Canadian Broad. Corp. v. New Brunswick* [1993] 143 N.B.R.2d 174).

556. *Dagenais* [1994] 3 S.C.R. at 489.

557. *Id.*

558. *Id.* at 489-90 (citing *Canadian Broad. Corp. v. New Brunswick* [1994] 148 N.B.R.2d 161). In a concurring opinion worth noting for its pre-*Dagenais* perspective, Angers, J.A., said he would have denied the CBC's standing to appeal. *Id.* at 391-92. Angers reaffirmed the superiority of fair trial over free press rights, explicitly rejected by *Dagenais*, and denied that the press has a constitutional right to gather news under section 2(b). *Id.* at 391. Noting the press's duty to inform, and "its temptation to entertain," Angers declared that the media's argument that freedom to publish necessarily includes freedom to gather information was, in his view, really "misleading and fallacious." *Id.* at 390-91 (quoting *Canadian Broad. Corp. v. New Brunswick*, [1994] 148 N.B.R.2d 161 (Angers J.A. concurring)). Contrast that attitude with the post-*Dagenais* decision of the Northwest Territories Supreme Court in *Canadian Broad. Corp. v. Canada* [1995] 122 D.L.R.4th 698 (S.C.C.), giving the broadcasters access to audio and videotapes entered as evidence in a criminal trial:

The *Dagenais* case thus marks a clear departure from the pre-Charter common law rule in Canada, which gave primacy to fair trial rights over those of free expression wherever they came into conflict. This hierarchical approach is now to be avoided. Instead, the proper interpretation and application of the Charter requires a judicious balance to be achieved which fully respects the various constitutional rights of all concerned; and, in each case, the balance is to be struck with due regard for its particular factual circumstances.

*Id.* at 708. That court, in fact, was rather more solicitous of the rights of Canadian broadcasters (as opposed to print media) than the United States Supreme Court has been. Cf. *Nixon v. Warner Communications Corp.*, 435 U.S. 589 (1965).

The Supreme Court of Canada had no difficulty finding that section 486(1) infringed upon press freedoms guaranteed by section 2(b). The court held that those press freedoms guaranteed by section 2(b) established the "right of members of the public to obtain information about the courts" through a "free and vigorous" press.<sup>559</sup> Likewise, the Court readily found that section 486(1) was "saved" by section 1, as "reasonable and demonstrably justified in a free and democratic society," using the *Oakes* test as informed by *Dagenais* and *RJR-MacDonald Inc. v. Canada*.<sup>560</sup> The CBC had conceded the "pressing and substantial nature" of the legislative objective of section 486(1), and the Court found all three elements of the proportionality requirement: a rational connection between the order in question and the legislative objective, minimal impairment of the constitutional guarantee, and "proportional effects," even as reformulated after *Dagenais* to balance the deleterious effects of the statute against its salutary effects (rather than its legislative objective).<sup>561</sup>

The Supreme Court broke with the lower tribunals in assessing the degree of deference accorded the trial judge. In his opinion for the unanimous Court, Justice La Forest held that *Dagenais* imposed a section 1-like balancing on any court ordering a publication ban or reviewing such an order.<sup>562</sup> As in *Dagenais*, the moving party would bear the burden of proving each element of the balancing test, and the trial court must have a sufficient evidentiary basis for granting the motion.<sup>563</sup> Justice La Forest said that in the case before the Court the trial judge should have conducted a *voir dire* to enable the Crown to disclose facts not known to the court.<sup>564</sup> Absent sufficient evidence "to support a concern for undue hardship," but with "some reluctance in light of the proper deference to be accorded the exercise of discretion," the Supreme Court held that the trial court had improperly exercised its discretion and ordered release of the transcripts of the closed proceedings.<sup>565</sup>

The trial judge had closed the proceedings assuming that public disclosure of the facts would have imposed "great undue hardship on

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559. *Canadian Broad. Corp. v. New Brunswick* [1996] 3 S.C.R. 480, 493-501.

560. *Id.* at 497-515. In *RJR-MacDonald Inc. v. Canada*, [1995] 127 D.L.R.4th 1 (S.C.C.), the Court struck down federal legislation essentially banning all cigarette advertising.

561. *Canadian Broad. Corp. v. New Brunswick* [1996] 3 S.C.R. 480, 501-514.

562. *Id.* at 515.

563. *Id.* at 515-16.

564. *Id.* at 516.

565. *Id.* at 523.

the persons involved, both the victims and the accused."<sup>566</sup> The Supreme Court found no issue of hardship to the accused once he had pleaded guilty and, with no irony whatsoever, pointed out that "the privacy of the victims was already protected by a non-publication order by which their identities were withheld from the public."<sup>567</sup> Plus ça change, plus ça même chose.

### B. On the Media

Both the publication ban surrounding the Homolka trial and the response of Canadian cybercasters posed a number of legal and ethical questions for Canadian and American journalists. Was the publication ban constitutional under Canadian law and should it be obeyed by Canadian journalists? Did the ban represent a human rights violation that transcended national laws, justifying defiance by American journalists? And how were the answers to these questions affected by the presence of a pervasive new medium that enabled its users to flout not only Canadian law, but also the ethical norms of traditional journalism? Indeed, are mainstream journalistic conventions of accuracy, objectivity, taste, and accountability, not to mention respect for the law, corrupted or rendered obsolete by the new communications technology?

*Dagenais* answered the first question in the negative, but Canadian journalists nevertheless generally respected the publication ban.<sup>568</sup> Absolutists who see the American notion of free speech and press as a transcendent human right would do well to examine article 10 of the Convention for the Protection of Human Rights and Freedoms, which closely tracks section 1 of the Canadian Charter of Rights and Freedoms.<sup>569</sup> The questions regarding the role of the press in the age

566. *Id.* at 518 (quoting the trial court).

567. *Canadian Broad. Corp. v. New Brunswick* [1996] 3 S.C.R. 480, 521.

568. In his book, Nick Pron notes that, throughout the ordeal, the mainstream Canadian media outlets remained silent. Many reporters believed what the courts were doing was wrong and some talked about defying the gag order and the wishes of their bosses. But none did, at least not in print.

Word got out nonetheless. One reporter held a press conference for everyone in the newsroom, although Kovacs had warned journalists that they could discuss the information only with their immediate superiors. Other journalists had told spouses, partners, relatives, friends, and parents. One reporter recounted the banned information to his barber, who in turn passed it on to his customers.

PRON, *supra* note 25, at 403-04.

569. See, e.g., *The Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. Rep. (Ser. A, No. 30) 245 (1979) discussing article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). In that case, the newspaper was enjoined from publishing an article regarding the testing, manufacture, and marketing of the mutagenic drug thalidomide while

of the Internet are more difficult, and it is on those questions that the rest of this section focuses.

Historically, journalists have frequently defied governmental restrictions on what they could and could not publish.<sup>570</sup> Today's professional journalist, however, is far more likely to challenge access or publication restrictions in court or in the legislature, rather than baldly defy the law. Exceptions, such as a reporter's refusing to reveal a source or disregarding a court-ordered prior restraint, are so rare they make national news.<sup>571</sup> The mainstream Canadian press scrupulously complied with the Justice Kovacs's order, and even some American journalists opted to respect the Canadian ban.<sup>572</sup>

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civil litigation was pending. *Id.* at 252-53. When the House of Lords upheld the injunction, the newspaper filed an application with the European Court of Human Rights claiming that the injunction infringed on their right to freedom of expression under article 10. *Id.* at 266. Article 10 allows for the restriction of freedom of expression where the restriction is "prescribed by law and . . . necessary in a democratic society." *Id.* at 245. In interpreting the word "necessary," the court found that, while "not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable', and that it implied the existence of a 'pressing social need'." *Id.* at 275-76. The similarity between article 10, so explicated, and section 1 of the Canadian Charter of Rights and Freedoms, allowing reasonable restrictions on free expression where "prescribed by law" and "demonstrably justified in a free and democratic society," is striking. Scholars have found it "unlikely" that the two formulations are "appreciably different in impact." Maxwell Cohen & Anne F. Bayefsky, *The Canadian Charter of Rights and Freedoms and Public International Law*, 61 CANADIAN BAR REV. 265, 308 (1983). In addition, one human rights practitioner insists that "every international human rights instrument, whether or not Canada has signed it, can be used as an interpretive tool." David Matas, *Domestic Implementation of International Human Rights Agreements*, 1987 CANADIAN HUMAN RIGHTS YEARBOOK 91, 96 (William Pentney & Daniel Proulx, eds.).

570. The impulse of journalists, professional or amateur, to defy governmental restrictions on what they can publish is as old as the restrictions themselves. The first great censor of the English-speaking world, Henry VIII, issued a proclamation in 1544 "calling in and prohibiting certain books printed of news of the success of the king's armies in Scotland." FREDERICK SEIBERT, *FREEDOM OF THE PRESS IN ENGLAND, 1476-1776*, 50 (1965). King Henry's edict was prompted, at least in part, by the "unseemly" interests of his subjects in matters of state, although the accounts were apparently favorable and true. *Id.* According to Seibert, King Henry was also concerned about the effect the news might have on scavengers who were inclined to follow successful armies and on foreign states with whom he was conducting negotiations. *Id.* Indeed, unofficial reports of the proceedings of Parliament, absolutely prohibited until the eighteenth century, were regularly carried by seventeenth-century newsletter writers and, occasionally, by pamphleteers and even newspaper publishers. *Id.* at 285-88. The secret trials of the seventeenth-century Court of Star Chamber, many involving printers and publishers themselves, *id.* at 120-21, most directly influenced contemporary attitudes favoring open and freely reported trials. Gerald L. Gall, *THE CANADIAN LEGAL SYSTEM* 102 (2d ed. 1983).

571. See, e.g., Jim McGee, *Tale of the Noriega Tapes; How CNN's Constitutional Battle Was Joined*, WASH. POST, Nov. 25, 1990, at A1. But see *Jailing of Reporter Barely Creates Ripple*, THE NEWS MEDIA & THE LAW, Winter 1994, at 2.

572. Significantly, the CNN program "Reliable Sources" introduced a telecast on the publication ban entitled "Gagging a Free Press" with the following disclaimer: "Because of the ban imposed on the media in this case and since 'Reliable Sources' airs in Canada and CNN is

No such inhibitions were evident in the Internet newsgroups and discussion lists dealing with the Homolka trial. While it may be debated whether these highly speculative electronic exchanges technically violated the publication ban, Ontario authorities treated them as illegal and the perpetrators took commensurate defensive measures.<sup>573</sup> Overriding all other considerations was the newsgroup participants' conviction that information should be unqualifiedly free.<sup>574</sup>

Such absolute freedom is alien to the Canadian journalistic culture,<sup>575</sup> and even among American journalists, it is more a remote ideal than a practical reality. Moreover, professionals on both sides of the border would agree that such freedom as does exist carries with it at least some moral obligations.<sup>576</sup> As embodied in various codes of ethics, these obligations may differ at the margins, but many key values are nearly universal. Among these values are accuracy, objectivity, taste, and accountability, all of which were either missing or distorted in the on-line "journalism" that emerged from this case. However, the on-line "journalism" was in keeping with the spirit of an earlier journalism and may foreshadow a journalism to come.

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abiding by the judge's gag ruling, we won't be able to discuss the details of the crime. But despite these restrictions, we've chosen to do our program on this topic because we feel the general issues involved are important and relevant to journalism." *Reliable Sources: Gaggling a Free Press Transcript #94* (CNN television broadcast Dec. 12, 1994) [hereinafter *Reliable Sources, Transcript #94*] at 1.

573. See *supra* note 268. There is at least some question as to whether maintaining or posting to an electronic bulletin board constituted publication for purposes of the publication ban; or whether the ban could be enforced against anyone who was not in the courtroom during Homolka's trial or whose information originated elsewhere.

574. This idea was also manifest in the archiving of copyright-protected print materials such as *The Washington Post* and *Newsweek* articles. The relationship between intellectual property law and computer-mediated communications has been (and continues to be) the subject of numerous studies and lies far beyond the scope of this one. For an early exposition, see ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 214 (1984).

575. CLARE F. BECKTON, *THE LAW AND THE MEDIA IN CANADA* 68 (1982).

Since the Americans separated from Britain by violent means, they were unwilling to allow many of the measures adopted in Great Britain to remain as law. One of the early resolves was to maintain freedom of speech, religion and the press, which were ultimately guaranteed through amendments to the Constitution.

Since Canada did not separate from Great Britain by violent means, this desire to sever British traditions and laws was not present. As a result, Canadian law evolved much in the same manner as did the later British law. The most severe repression of the press, however, never existed here because by the time Canada was settled such repression had decreased in Britain.

*Id.*

576. STEPHEN KLAIDMAN & TOM L. BEAUCHAMP, *THE VIRTUOUS JOURNALIST* 12 (1987).

A dedication to accuracy is the very essence of ethical journalism today. "Truth is our ultimate goal," declares the Code of Ethics of the Society of Professional Journalists.<sup>577</sup> "There is no excuse for inaccuracies. . . ."<sup>578</sup> Yet much of the information available over the Internet on the Mahaffy-French murders and the Homolka-Bernardo relationship was anything but factual, and professional Canadian journalists knew it:

Well, there's some horrific rumors going around about this case now, and the trouble is people are going to hear these rumors, and they're going to cement that in their brain, that—for instance, that he's done some really awful things. I don't know if I can get into it, but they're just wild rumors. I've heard some real dillies, and the trouble is that a lot of people are believing these rumors because they don't know otherwise. I can't clarify it for people. People call me and ask me, "Is this wild rumor true?" and I say to them, "I just can't tell you."

. . . .  
You've got public opinion influenced very strongly in this case by a lot of wild rumors that are floating around, and the media whose job it is to clarify things—we can't clarify. We just sit there, and we just throw our hands up.<sup>579</sup>

The frustration in *Toronto Star* reporter Nick Pron's words was clearly directed at the publication ban that prevented him from fulfilling his perceived obligation to accuracy, but may also reflect some resentment toward a medium that so glibly scorned his profession's condemnation of rumor and gossip.<sup>580</sup> It is a given, in both American and Canadian journalism, that unsubstantiated allegations are not to be published.<sup>581</sup> "To be as accurate as possible requires reporting as facts only information for which there is good and sufficient evidence, and no reasonable doubt about the preponderance of the evidence."<sup>582</sup>

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577. SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (1987), reprinted in JAY BLACK ET AL., DOING ETHICS IN JOURNALISM 5 (1995) [hereinafter "SOCIETY OF PROFESSIONAL JOURNALISTS CODE OF ETHICS"].

578. *Id.*

579. Nick Pron, speaking on CNN's "Reliable Sources." *Reliable Sources*, Transcript #94, *supra* note 572, at 3.

580. Pron would later give the cybercasters one grudging paragraph in his 400-plus-page book on the subject, noting that they "tried to separate the truth from the rumors, and often succeeded." PRON, *supra* note 25, at 403 (1995).

581. BLACK, *supra* note 577, at 43.

582. KLAIDMAN, *supra* note 576, at 50. They go on to say, however, that, "If doubt remains about the accuracy of a purported fact, the doubt should be incorporated into the story." *Id.*

There is no need here to discuss how often the mainstream media fail to attain that standard,<sup>583</sup> although that is clearly one source of public cynicism about media ethics; the fact is that unsubstantiated allegations often seem to appear in the mainstream media with less candor as to sources and reliability than were found in the Internet coverage of the Mahaffy-French murders. Most of the purported evidence in the Homolka case presented in the <alt.fan.karla-homolka> FAQ, for example, was clearly labeled as rumor and sourced, not only to the persons who posted the rumors, but also to their own sources.<sup>584</sup> Anonymity was preserved, of course, but some guidance was provided for the reader to use in gauging reliability.

There was yet another safeguard that permitted the electronic audience to gauge the accuracy of posted reports. Everyone who read this material had the ability to reply, either privately to individual contributors or publicly to the entire audience.<sup>585</sup> Posted information was subject to intense scrutiny by readers who could freely and vigorously express their skepticism to every other member of the audience; everything was open to debate and argument, and known falsehoods were mercilessly attacked. In some ways, cyberspace had become the very battlefield that Milton envisioned.<sup>586</sup>

This is not to say that the "truth" that emerged from this process was as accurate or as reliable as the professional reporting that would have occurred absent a publication ban. Nor does it measure the potential effect that those purported facts might have had on Bernardo's right to a fair trial. That has nothing to do with accuracy, of

583. Premature reporting of false evidence in the contemporaneous O.J. Simpson murder case was also the subject of considerable media criticism and self-scrutiny. See, e.g., M.L. Stein, *Can O.J. Get a Fair Trial? Debate on Fairness of Media Coverage Continues*, EDITOR & PUBLISHER, July 9, 1994, at 9; ABC News Nightline Viewpoint: *O.J. and the Media* (ABC television broadcast, July 22, 1994).

584. Each set of rumors was attributed to the person who contributed them (e.g., "The following statements were made by Lt. Starbuck.") and many contained further sourcing (e.g., "Rumours heard via the Kitchener-Waterloo fire department. . ." "My sources in the pathologist's office, corroborated by a nurse at one of the larger Southern Ontario hospitals. . ." "This info comes from a friend who 'talked to a cop in the investigation.' Hearsay, I guess, so take it for what it's worth.") FAQ 4.0, *supra* note 259.

585. HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY* 130 (1993). "In television, newspapers, magazines, films, and radio, a small number of people have the power to determine which information should be made available to the mass audience. In Usenet, every member of the audience is also a potential publisher." *Id.*

586. "[T]hough all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter." JOHN MILTON, *AREOPAGITICA* 58 (Sir Richard C. Jebb ed., Cambridge University Press 1918, reprinted AMS press 1971) (1644).

course; the ban was designed to suppress truthful details. But it does suggest a philosophical commitment to providing the audience with as much information as could be collected and letting them sort it out. It harkens back to what Conrad Fink has called a "libertarian" philosophy concerning the press and its place in society,<sup>587</sup> a philosophy that dominated journalism ethics until the early twentieth century saw the beginnings of "social responsibility" journalism.<sup>588</sup>

After accuracy, objectivity has become the *sine qua non* of this now-prevailing journalistic ethic. Fink traces that development to the late 1800s and especially to the reorganization of the Associated Press in 1894.<sup>589</sup> Of course, objectivity has not always been fundamental to either the American or British journalism tradition. Well into the nineteenth century, news was colored by the political loyalties of editors and publishers, Tory or Whig, Federalist or Republican.<sup>590</sup> Even today, objectivity remains an elusive goal, variously defined as maintaining a professional distance<sup>591</sup> or presenting balanced accounts.<sup>592</sup>

Again, no such constraints burdened the cybercasters studied here; they seemed to betray not the slightest doubt as to Bernardo's guilt. On other issues, however, a natural objectivity emerged from the multiplicity of voices and opinions, particularly concerning the propriety of Homolka's sentence and the publication ban itself.<sup>593</sup> The kind of objectivity that is achieved by balancing opposing views within each published article or broadcast "spot" seems no more necessary (or even desirable) in this context than in letters to the editor columns, talk radio, or television town meetings. Like Internet newsgroup postings or chat room exchanges, these are valued for the uninhibited clash of raw ideas, rather than for the mediated balancing performed by 'objective' journalists. No reasonable person would expect such objectivity in these conventional forums; there is no reason to hold the Internet to that standard.

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587. "[Libertarian philosophy] placed great faith in the ability of the people to make rational, intelligent decisions, to find truth if sufficient information were available through a free press in a free society that protected free expression. . . . The sense of freedom extended even to freedom from any responsibility to the public . . . ." CONRAD C. FINK, *MEDIA ETHICS* 8 (1988).

588. *Id.* at 9.

589. *Id.* at 8.

590. MICHAEL EMERY AND EDWIN EMERY, *THE PRESS AND AMERICA* 13-15, 74-81 (1988).

591. KLAIDMAN, *supra* note 576, at 44.

592. FINK, *supra* note 587, at 10.

593. *See supra* note 269.



Taste is another mainstream ethical norm that was challenged in this corner of cyberspace. While the SPJ Code calls for journalists to avoid pandering to "morbid curiosity about details of vice and crime,"<sup>594</sup> the newsgroup <alt.fan.karla-homolka> was arguably created to do precisely that. Posted rumors about evidence presented at trial, or otherwise discovered in the investigation, were replete with the most graphic descriptions of sexual abuse, torture, and murder, including details that would make a tabloid publisher blush.<sup>595</sup>

Sensationalism is hardly a new journalistic phenomenon. Early newsbooks' preoccupation with sex and violence would easily rival that of today's tabloids, as evidenced by such titles as "The Examination, confessions and condemnation of Henry Robson, fisherman of Rye, who poisoned his wife in the strangest manner that ever hitherto hath bin heard of" (1598) and "The crying Murther: Contayning the cruell and most horrible Butcher of Mr. Trat" (1624).<sup>596</sup> Mitchell Stephens attributes the appearance of this sensational journalism, not to social depravity or disintegration, but to the development of new technology—the printing press—serving an ever increasing audience "whose appetite for sensation was, more or less, normal."<sup>597</sup> Much the same could be said for today's shock disk jockeys, tabloid television programs, and more than a few Usenet newsgroups and World Wide Web sites.

Interestingly, much of the graphic sex and violence associated with the Homolka story found its way into <alt.fan.karla-homolka> during the early months of the newsgroup. Later discussions increasingly focused on the publication ban itself and attempts to enforce it. The newsgroup's FAQ offered a detailed rationale for opposing the ban, and the debates were usually earnest and often well informed.<sup>598</sup> Anyone looking for titillation would be better served by reading *Lethal Marriage* by mainstream *Toronto Star* journalist Nick Pron, who serves up more than 400 pages of unrelenting sleaze.<sup>599</sup>

Finally, where the SPJ Code calls on journalists to be "accountable to the public for their reports,"<sup>600</sup> the most influential contributors to the Internet dialog on the Homolka trial used pseudonyms like

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594. SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS, *supra* note 577, at 6.

595. See FAQ 4.0, *supra* note 261.

596. MITCHELL STEPHENS, A HISTORY OF NEWS 112-117 (1988).

597. *Id.* at 117.

598. See *supra* note 269 and accompanying text.

599. PRON, *supra* note 25.

600. SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS, *supra* note 577, at 6.

"Abdul" and "Lt. Starbuck."<sup>601</sup> Many participants posted messages through remote computers equipped with software that rendered them untraceable.<sup>602</sup>

Like partisanship and sensationalism, anonymous and pseudonymous journalism has a distinguished past. From Cato to James Alexander,<sup>603</sup> journalists have hidden from hostile authorities. Similar precautions were understandable here, with police threatening to shut down computer systems that facilitated publication ban violations.<sup>604</sup> But the presence of these defensive measures did not negate accountability, any more than they did in the eighteenth century. Consider the whole of the SPJ admonition: "Journalists should be accountable to the public for their reports and *the public should be encouraged to voice its grievances against the media*. Open dialogue with our readers, viewers, and listeners should be fostered."<sup>605</sup> Nowhere has that notion of accountability been more literally fulfilled than on the Internet.

It is possible to distill from the foregoing discussion certain norms that are evolving from the use of the Internet as a new journalistic medium in its own right (as opposed to an electronic transmission system for print journalism). Those norms include notions of truth

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601. FAQ 4.0, *supra* note 261.

602. See *supra* note 261.

603. Cato was the pseudonym of John Trenchard and Thomas Gordon, who wrote 138 letters on freedom of speech and other liberties that were published in the *London Journal* between 1720 and 1723. EMERY AND EMERY, *supra* note 590, at 14. The letters were collected and published in four volumes that had a substantial influence on American libertarian thinking. *Id.* James Alexander was the New York attorney whose scathing and anonymous indictments of the royal governor landed his printer, John Peter Zenger, in jail. *Id.* at 39. Zenger's acquittal for Alexander's seditious libel by jury nullification is legendary in American journalism. *Id.* at 384.

604. At least one of the activists was caught in the dragnet. When Abdul inadvertently sent a copy of the FAQ to the Ontario Attorney General's ministry, he inadvertently compromised Lt. Starbuck's true e-mail address at the University of Western Ontario. In a message to Abdul, Reg Quinton, Western's system administrator, wrote:

As you may know there have been a number of incidents [with regard to] the printed media. Over the last month or so I have been involved with the London Police Department (LPD) and their investigation of a user here at Western [Lt. Starbuck, Abdul says] who has used electronic communications to violate the ban. The user had his account seized at the request of the LPD and has cooperated fully with their investigation. The user's account has since been restored but he has been advised by both the police and the chair of his department that he had better behave if he expects to keep his account and not be charged.

Abdul said Quinton went on to warn that if police asked him to search the Western machines in the future, he will allow it as matter of course, without a warrant, lest they "seize the machine." FAQ 4.0, *supra* note 261.

605. See SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS, *supra* note 577, at 6 (emphasis added).

and objectivity that entail the sifting through fact, opinion, and rumor, not by a small editorial elite for a largely passive audience, but by an active, informed, and empowered audience, each member of which can contribute to the product. And they include concepts of taste and accountability that combine unqualified freedom for the contributor with immediate and public reaction from the audience.

What these principles share is that they flow from the technology itself, naturally, almost unconsciously. These are not notions of right and wrong transplanted by journalists from the "real world," but the evolutionary norms of a new and growing communications community, the "virtual community," whose medium is the Internet. When one considers that the Internet was expressly designed to be a decentralized communications medium, lacking any command and control center,<sup>606</sup> these norms seem far more appropriate than any that might be imported from conventional journalism.

And what of the future? Is this new medium destined to corrupt or even destroy the ethical structure that journalists and their audiences have come to rely on? Conrad Fink sees contemporary journalism ethics evolving again from a "social responsibility" model to an "ethical-reactive" stage characterized by defensiveness, hesitation, and issue-straddling.<sup>607</sup> "Ethical-reactive journalism," he says, "cannot be permitted to overpower the historic responsibility of doing on the front page and in the 6 p.m. news what, in the judgment of professional journalists, *must* be done."<sup>608</sup>

The mainstream press's timorous response to the ban Homolka trial coverage is a symptom of this slide into ethical-reactive journalism. The ban-breakers' response is an antidote, bringing new vitality to a repressed libertarian tradition and the promise of renewal for journalism itself. Publishers and broadcasters do not need to share the same ethical standards as the new medium to benefit from its spirit.

Indeed, two newspaper publishers recently demonstrated how mainstream journalism may embrace the legacy of the Canadian ban-breakers. First, on Feb. 28, 1997, *The Dallas Morning News* posted to

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606. RHEINGOLD, *supra* note 585, at 74. As early as the 1950s, RAND Corp. analysts recognized that the conventional communications infrastructure would be a vulnerable target in a nuclear war. RAND's Paul Baran proposed eliminating any command center for communications and replacing it with decentralized nodes that were each capable of communicating with all of the others. Messages would be chopped into small packets of data that would travel through the network by the most expeditious routes. Packets would be routed around any nodes that were destroyed and reassembled at the destination node. Baran's idea was adapted for ARPANET, the precursor of today's Internet. *Id.*

607. FINK, *supra* note 587, at xx.

608. *Id.* at xxiii.

its Web site a story asserting that Timothy McVeigh, then awaiting trial for murder in the bombing of the Murrah federal office building in Oklahoma City, had confessed to defense attorneys.<sup>609</sup> The story was sourced to confidential defense documents that the newspaper claimed it obtained lawfully, but the nature and timing of the story, as well as its unique delivery method, prompted more than a little soul-searching within the journalism community.<sup>610</sup>

Had this story been published in the newspaper or broadcast on television, many of the same ethical issues would still have been raised. Breaking the story on-line enabled the *Morning News* to scoop its competition (including its own print edition) and avoid any possible injunction.<sup>611</sup> But it also seemed to lend an unseemly haste to the decisionmaking process that intensified the hostile reaction from other journalists. Something new was happening here, something that threatened to preempt the self-examination demanded of 'responsible' journalism today.<sup>612</sup> Nevertheless, the die is cast. The *Morning News* may have been the first major newspaper to use the Internet in this way;<sup>613</sup> surely, it will not be the last.

In an even closer parallel, Chile's largest newspaper, *La Tercera*, recently circumvented a judge's gag order by publishing its coverage of a sensational trial on the Internet.<sup>614</sup> Judge Beatriz Pedrals imposed a news blackout on the trial of Mario Silva Leiva, accused of

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609. *The McVeigh Dilemma*, QUILL, April 1997, at 17. See also Pete Slover, *McVeigh Admitted Bombing, Memos Say; His Attorney Disputes Documents' Credibility*, THE DALLAS MORNING NEWS, March 1, 1997, at 1A.

610. See, e.g., *The McVeigh Dilemma*, QUILL, April 1997, at 17. *Morning News* editor Ralph Langer responded to critics who accused the *News* of giving no thought whatever to the effect of its revelations on the McVeigh trial. Ralph Langer, *Our Story, Process Correct; Public Disclosure Directed by Series of Allegations*, QUILL, April 1997, at 19. "We had concern about the trial," Langer said, "but, ultimately, came to believe that the information . . . was of national importance and that we were obligated to publish it." *Id.* Responding that Langer's explanation required a "considerable leap of faith," journalism ethics maven Bob Steele demanded to know more about how Langer reached that decision. Bob Steele, *Until We Know, Let Us Challenge; Questions of Journalism, Ethics*, QUILL, April 1997, at 28. "We want to know why the paper decided to publish that story on that weekend. And, it's very important to understand to what degree they considered the interest of the victims and victims' families." *Id.*

611. Editors may have been thinking back to the 1995 injunction that kept *Business Week* from publishing a major scoop for three weeks. Keith H. Hammonds and Catherine Yang, *Business Week vs. The Judge*, BUS. WK., Oct. 16, 1995, at 114.

612. Steele offers more than 60 ethics-related questions that Langer and staff should have asked themselves before publishing the story. Steele, *supra* note 610, at 28-29.

613. *The McVeigh Dilemma*, *supra* note 609.

614. See *Se Levantó Prohibición de Informar*, LA TERCERA (EN INTERNET), June 27, 1997 <<http://www.copesa.cl/casos/lavado/dinero30.html>>. See also *Chile Paper Skirts Gag Rule on Web*, CHI. TRIB., June 22, 1997, at 7; Howard Kurtz, *Media Notes*, WASH. POST, June 30, 1997, at C-1.

operating a multimillion-dollar drug trafficking and money laundering ring, but only after top court officials were implicated in the case.<sup>615</sup> With the assistance of a U.S.-based intermediary, *La Tercera* continued reporting on the case via the World Wide Web, recording as many as 45,000 hits a day.<sup>616</sup> *La Tercera* told its readers that the Web site would carry "all the news from Chile that currently is somewhat difficult to get"<sup>617</sup> and characterized its coverage of the trial as a "journalistic coup."<sup>618</sup> Editor Fernando Paulsen claimed a victory when the ban was lifted in late June:

Chileans can keep up with a case that has had a tremendous impact down here. In American terms, this would be equivalent to having set up a [Web] server in London to publish the Pentagon Papers.<sup>619</sup>

Media critic Howard Kurtz opined, "The Internet seems to making foreign censorship laws all but obsolete."<sup>620</sup>

### C. On National Sovereignty

The illicit flow of information across national borders as a response to domestic censorship hardly originated with the Internet. Sue Curry Jansen points out that 16th Century trade in books proscribed by the Roman Catholic Church generally involved border violations by printers in the northern Lutheran states that made handsome profits from the black-market trade in France, Italy, Spain and Portugal.<sup>621</sup> Indeed, she traces the establishment of networks for trafficking in proscribed works to the preprinting era of secular *scriptorem*.<sup>622</sup>

Likewise, the trial of Karla Homolka did not initiate Canadian sensitivity to American cultural imperialism. Anne Branscomb, who chaired the Communications Division of the Science and Technology Section of the American Bar Association, has called Canadians a "leader" in concern about cultural sovereignty:

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615. *Chile Paper Skirts Gag Rule on Web*, CHI. TRIB., June 22, 1997, at 7.

616. See Kurtz, *supra* note 614.

617. *Id.*

618. *Chile Paper Skirts Gag Rule on Web*, CHI. TRIB., June 22, 1997, at 7.

619. See Kurtz, *supra* note 614.

620. *Id.*

621. SUE CURRY JANSEN, CENSORSHIP: THE KNOT THAT BINDS POWER AND KNOWLEDGE 66 (1991).

622. *Id.* at 61.

Living in close proximity to the United States, Canadians have developed a deep awareness about the loss of cultural identity and control over their own information resources. Canada has developed transborder data flow policies in a number of fields including print media, motion pictures, direct broadcasting satellites and computers, and it has served as a model for many countries seeking national telematics policies.<sup>623</sup>

The *Dagenais* decision never mentions Paul Bernardo or Karla Homolka, but Chief Justice Lamer's judicial notice of the "advent of information exchanges available through computer networks" as a factor in reducing the effectiveness of publication bans<sup>624</sup> could not have referred to any other case. Were the Chief Justice and his majority merely bowing before the inevitability of this American-born, American-bred, and American-based medium (even across an international boundary and at the expense of long-revered legal values) to adopt a regime more compatible with the unruly behemoth to the south?

At least one commentator might think so. Literature Professor Frank Davey, writing before *Dagenais* was decided, said that [lt.fan.karla-homolka](#) "has implied the coming into being of a global information universe which may be dominated by American culture, because of its size, but which may also be containable by no national boundaries, not even American ones."<sup>625</sup> Following in the wake of American newspapers, television, and other media, and feeding the "restive, semirebellious, anti-authoritarian political feelings" of Canadian populism,<sup>626</sup> the Internet, as Davey sees it, has "vastly empowered the resultant Americanized grassroots opinion in Canada, amplified the ability of the Americanized citizen to act individually, and even subverted the power of a national state."<sup>627</sup>

[A][lt.fan.karla-homolka](#) signals not only the growing inability of Canada's courts to enforce their own orders, but also the Canadian

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623. Anne W. Branscomb, *Global Governance of Global Networks: A Survey of Transborder Data Flow in Transition*, 36 VAND. L. REV. 985, 1039 (1983) (citing CONSULTATIVE COMMITTEE ON THE IMPLICATIONS OF TELECOMMUNICATIONS FOR CANADIAN SOCIETY, CLYNE REPORT (1979); Ganley, *Political Aspects of Communications and Information Resources in Canada*, 1 INFO. SOC'Y (1981); Ostry, *Telecommunications in Canada: Today, Tomorrow and Next Week?*, 4 INTERMEDIA 6 (July 1979)).

624. *Dagenais v. Canadian Broad. Corp.* [1994] 3 S.C.R. 835, 886.

625. FRANK DAVEY, *KARLA'S WEB: A CULTURAL INVESTIGATION OF THE MAHAFFY-FRENCH MURDERS* 291 (1994).

626. *Id.* at 281.

627. *Id.* at 291.

government's inability to enforce its own sovereignty, thus signalling the growing impossibility for Canadians to define their own nation.<sup>628</sup>

While national sovereignty is not necessarily a good in itself, it is at present the only route through which individuals can exercise democratic rights to elect their legislators, decide social policy, administer a judiciary, and in general construct the social space in which they live. . . . The challenge which the Homolka case raises to countries like Canada is how to re-establish democracy in an age of globalization.<sup>629</sup>

If Davey is right, the Internet is America's ultimate weapon. After first softening up alien cultures with CDs and videos, Uncle Sam then gives the newly corrupted citizenry the power to administer the *coup de grace*. With the erosion of national political, judicial, and social institutions, nothing is left but Microsoft, Disney, and the Gap.

On one level, Davey surely exaggerates the influence of <alt.fan.karla-homolka>. Justice Kovacs's publication ban remained in force for its entire term. Even at the height of the media frenzy in mid-December 1993, more than a third of all Canadians remained utterly unaware of the case—not merely of prejudicial detail, but of the entire Homolka-Bernardo proceeding.<sup>630</sup> It would have been possible to find thousands of prospective jurors who knew nothing about Paul Bernardo, regardless of the ban.<sup>631</sup>

Moreover, there was little or no evidence of American influence on the Canadian legal system. Compared to the contemporaneous O.J. Simpson trial in Los Angeles, Paul Bernardo's trial was a model of Canadian efficiency and propriety. Karla Homolka's plea bargain was found "entirely appropriate" by a special board of inquiry headed by former Ontario Court of Appeal Justice Patrick Galligan.<sup>632</sup> Chief Justice Lamer took great pains in *Dagenais* to distinguish his analysis of publication bans from the American model and based his rule

628. *Id.* at 316.

629. *Id.* at 318.

630. See *supra* note 334. Davey himself points out that, as of 1993, only 30 percent of Canadian households had computers. See DAVEY, *supra* note 625, at 306.

631. Even Professor Davey would agree. Outside of St. Catharines, he writes, "the number of people actually interested in joining the Internet Homolka fan club, or in searching out copies of *Newsweek* or *The Washington Post* at their libraries, seems to have been small." See DAVEY, *supra* note 625, at 238. The inference he draws, however, that "[o]verall, Mr. Justice Kovacs's ban would appear to have succeeded," is unwarranted. See *id.* at 238.

632. Sarah Davison, *Plea Bargain Upheld in Canada's Gruesome Bernardo Case*, REUTERS, Mar. 18, 1996.

entirely on Canadian precedents.<sup>633</sup> And less than a year after *Dagenais*, the Supreme Court of Canada resoundingly rejected the radical American approach to libel law and reaffirmed the British-Canadian common law tradition.<sup>634</sup>

In *Hill v. Church of Scientology of Toronto*,<sup>635</sup> a Crown attorney funded by the Ministry of the Attorney General of Ontario sued the Church for impugning his character, competence and integrity.<sup>636</sup> The Church argued, *inter alia*, that the U.S. "actual malice" standard should be adopted and applied in this case to conform Canadian common law to Charter values.<sup>637</sup> Finding no government action, however, the Supreme Court of Canada in *Hill* held that the *Dagenais* analysis was inappropriately rigorous, and that the common law should only be changed if the party advocating change could prove both that the common law failed to comply with Charter values and that, on balancing the values involved, the common law should be changed.<sup>638</sup>

The Court recited the standard critiques of the "actual malice" requirement established in *New York Times v. Sullivan*,<sup>639</sup> cited its rejection by other common law countries,<sup>640</sup> and distinguished the factual contexts of *Hill* and *New York Times*.<sup>641</sup> "I can see no reason for adopting [the actual malice standard] in Canada in an action between private litigants," Justice Cory wrote for what was, on this question, a unanimous Court.<sup>642</sup> Even where, as here, the defendant demonstrated "very real and persistent malice,"<sup>643</sup> and the outcome would probably have been the same, the Court definitively rejected the

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633. *Dagenais v. Canadian Broad. Corp.* [1994] 3 S.C.R. 835, 882. As noted above, KARLA'S WEB was written before *Dagenais* was published; the suggestion that Davey might have seen it as vindication of his views is wholly this author's.

634. See *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130, 1187.

635. *Id.*

636. *Id.* at 1162.

637. *Id.* at 1158.

638. *Id.* at 1170-72.

639. 376 U.S. 254 (1964). Among the critiques are: that plaintiffs might be deprived of the right to establish falsity; that inquiry into media procedures might be more, rather than less, intrusive; that the cost of litigation is dramatically increased; and that the protection of falsehood exacts a major social cost by deprecating truth in public discourse. *Hill*, [1995] 2 S.C.R. at 1182-83.

640. See *id.* at 1185-86 (citing Britain's *Derbyshire County Council v. Times Newspapers Ltd.*, 1 All E.R. 1011 (1993), and Australia's *Theophanous v. Herald and Weekly Times Ltd.*, 124 A.L.J.R. 1 (H.C.) (1994)).

641. See *Hill*, [1995] 2 S.C.R. at 1187-88.

642. *Id.* at 1187.

643. *Id.* at 1207.



American standard and upheld the Canadian common law of libel as being fully compatible with the Charter's free speech guarantees.<sup>644</sup>

Although the availability of American communications technology and news and entertainment media facilitated noncompliance with the publication ban, the effort to break the ban was largely a Canadian enterprise. As Canada's professional journalists challenged the ban in court, Canadian amateurs, equipped with computers and wired into the Internet defied it outright. A "significant number" of Ontarians either actively sought, or at least received, some information they believed violated the ban,<sup>645</sup> while the American media were arguably excessively deferential to the Canadian order—more fearful for their Canadian assets and markets than dedicated to their own principles.<sup>646</sup>

On another level, though, Davey has a point. American free speech and free press values—the most liberal, arguably radical, in the world—pervade the very structure of the Internet, not to mention its content and conventions. As noted above, the Internet was designed to function without a command and control center that could be destroyed by a nuclear attack.<sup>647</sup> Thus, there is no central choke-point at which messages can be monitored, censored, or blocked;<sup>648</sup> it has been called the "most participatory form of mass speech yet developed."<sup>649</sup>

Although an estimated 40 million people around the world use the Internet on about 10 million host computers, fully 60 percent of those computers are located in the United States.<sup>650</sup> Even as American lawmakers grapple with their inability to block information originating overseas,<sup>651</sup> so officials in other countries, whose notions of free speech do not conform to the American model, must naturally cast a wary eye on the Internet's potential "Americanization" effect.<sup>652</sup>

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644. *Id.* at 1187-88.

645. *See e.g.*, *supra* notes 319-21 and accompanying text.

646. *See supra* note 572.

647. *See supra* note 606.

648. *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 832 (E.D. Pa. 1996) (holding the Community Decency Act of 1996 unconstitutional), *aff'd*, 117 S. Ct. 2329 (1997). The *per curiam* findings of fact in this decision contain a thorough description of the Internet's decentralized structure and operating procedure. *American Civil Liberties Union v. Reno*, 929 F. Supp. at 830-38.

649. *American Civil Liberties Union v. Reno*, 929 F. Supp. at 883 (separate opinion of Dalzell, J.).

650. *Id.* at 831.

651. Electronic pornography is one example. *See id.* at 882 (separate opinion of Dalzell, J.).

652. In early 1996, German prosecutors warned American on-line services America On-Line and CompuServe that they would face prosecution if they continued to allow access to neo-

And while these nations are devising ways to license Internet access and content providers,<sup>653</sup> the U.S. Supreme Court has already struck down what little regulation Congress has seen fit to impose.<sup>654</sup>

U.S. District Judge Stewart Dalzell framed the issue from the American perspective for all nations that would enjoy the benefits of the "never-ending worldwide conversation" that is the Internet.<sup>655</sup>

It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country and indeed the world has yet seen. The plaintiffs in these actions correctly describe the "democratizing" effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche.<sup>656</sup>

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Many find some of the speech on the Internet to be offensive and hear, amid the din of cyberspace, discordant voices that they regard as indecent. The absence of governmental regulation of Internet content has unquestionably produced a kind of chaos, but as one of the plaintiffs' experts put it with such resonance at the hearing: "What achieved success was the very chaos that the Internet is. The strength of the Internet is that chaos."<sup>657</sup>

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Nazi materials and pornography, respectively. *Hate Material Gets Internet Firms in Trouble*, CHI. TRIB., Feb. 4, 1996, at 6. See also Dinah Zeiger, *CompuServe Halts 'Obscene' Newsgroups*, DENV. POST, Dec. 27, 1995, at CO1. In 1997, the head of Compuserve's German operations was formally charged with distributing pornography and neo-Nazi materials. Louise Kehoe and Paul Taylor, *The Long Arm of the Law Catches Up with the Internet*, FIN. POST, April 25, 1997, at 53.

653. China has required Internet users to register with the police since February 1996 and to promise not to harm the country or commit crimes. Regulations promulgated in May 1997 require all businesses involved in international networking to apply for a license. *China Toughens Access Rules for Internet Business*, REUTER BUSINESS REPORT, May 30, 1997. The Singapore Broadcasting Authority began licensing all Internet access and content providers in March 1996 to check such abuses as pornography, hate literature, sowing social and religious discord, and criminal activities. Darren McDermott, *Singapore Unveils Sweeping Measures to Control Words, Images on Internet*, WALL ST. J., March 6, 1996, at B6.

654. See *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997) (striking down the only federal statute explicitly regulating content on the Internet).

655. *American Civil Liberties Union v. Reno*, 929 F. Supp. at 883 (separate opinion of Dalzell, J.).

656. See *id.* at 881.

657. *Id.* at 883 (footnote omitted).

Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacaphony of the unfettered speech the First Amendment protects.<sup>658</sup>

For those countries that find such chaos and cacaphony intolerable, the Internet poses a serious threat to prevailing social, political and/or legal values. The trade-off is unprecedented access to all the world's expertise, information and, occasionally, wisdom. In Canada, it appears that underlying legal values have not been harmed by an accommodation with the reality of transborder information flows. It remains to be seen how well other systems will cope.

### CONCLUSION

The emergence of communication systems and technologies that freely and instantly transcend international frontiers has contributed immeasurably to the demise of repressive political regimes that would maintain power by keeping their people ignorant of the world around them. At the same time, however, even democratic regimes that value the free flow of information fear that unrestrained use of these technologies, especially in the service of American information and entertainment merchants, will overwhelm their peoples' own cultural sensibilities and legal traditions.

Especially vulnerable to American information imperialism is the Anglo-Canadian tradition of prior restraints on publication of political or legal information that is seen as posing a threat to some higher value, whether the perceived national security interests of the nation or the right of a defendant to a fair trial. Despite this vulnerability, the Supreme Court of Canada has adopted an "effectiveness" criterion for imposing a prior restraint test on judicial proceedings that appears to edge the Canadian legal systems a mite closer to the American model.

The Court never had the opportunity to apply its new rules to Canada's most notorious publication ban, an order whose effectiveness was diminished, in part, by the proximity of the American free press tradition and the power of its communications media.<sup>659</sup> Had it

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658. *See id.*

659. Without referring to this specific case, former Canadian Supreme Court Judge Willard Estey told a Toronto audience that the power to impose publication bans in high-profile criminal cases "must be rethought in some areas because it's unenforceable." Tracey Tyler, *High-Profile Media Bans Unrealistic, Ex-Judge Says*, TORONTO STAR, April 22, 1994, at A3. Estey, who headed the Ontario Press Council, which tries to resolve citizen complaints against member newspapers, was referring primarily to the proximity of "the most aggressive media in the world" and pointed out that "[h]ardly any Canadian lives more than 90 miles from a U.S. television transmitter." *Id.* Estey spoke at Toronto's Empire Club as part of a series on Media and Society

considered the case, however, it might have concluded that, notwithstanding the publication ban, any Canadian interested in learning about the Mahaffy-French murders and the Homolka trial had ample opportunity to do so. While the ban may have succeeded in preventing some, though not all, of the proscribed information from appearing in the mainstream media, most of it could easily have been inferred from what had already been reported before Paul Bernardo's arrest.<sup>660</sup> Such efforts as there were to shut down access to the flow of information on the Internet were largely futile, a result of the network's purposely decentralized structure and availability of detailed instructions on how to exploit it.<sup>661</sup>

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cosponsored by the Empire Club and the Canadian Journalism Foundation. *Id.*

660. Consider for a moment the kind of reporting that, in the Crown's view, would constitute a breach of Canada's *sub judice* rule: imputations of guilt, including suggesting that the police investigation has been brought to a successful conclusion with the arrest of the offender; inadmissible evidence, such as information about the offender's bad character or prior bad acts; media investigations and interviews with potential witnesses; feature stories linking the accused and the pending charges. Respondent's Factum, *supra* note 403, at 42-47. Virtually all of those taboos had been broken even before Homolka's trial occurred and, as the Crown itself averred, the decision not to initiate contempt proceedings against offending media did not necessarily mean that no harm had been done. *Id.* at 80-81. To the contrary, so much information had been made available that lifting the publication ban would have had little incremental effect. The media coverage prior to Homolka's trial was conveniently summarized in the Respondent's Factum prepared by the Ontario Attorney General in the publication ban appeal, Thomson Newspapers v. The Queen, at Appendix A.

661. An anonymous poster to the Teale-Tales discussion list on Dec. 31, 1994, offered the following:

On the CBC-TV Prime Time News (10:00 p.m., Thurs., Dec. 29) the CBC reporter demonstrated with enthusiasm just how easy it is to get all sorts of banned information, showing excerpts from banned articles from the *Washington Post*, pictures digitized from Maclean's, and so on. To anyone the slightest bit familiar with Internet tools like Mosaic, or Netscape, he also gave explicit instructions on how to see the secrets for yourself. Several close-up shots of computer screens clearly showed where the information was obtained: "<http://www.cs.indiana.edu/canada/karla.html>"

Posting to <teale-tales@io.com> dated Dec. 31, 1994 (visited Dec. 31, 1994).

And this, from the FAQ:

Q. My site won't carry <alt.fan.karla-homolka>. What can I do?

There are several options.

You can find an alternate newsgroup that carries this group. For example, on a UNIX based system, the command "setenv NNTPSERVER news.belwue.de" will change your default news server to a news server from a site in Germany, from which you can read "alt.fan.karla-homolka" and other banned newsgroups. Just exchange your regular .newsrc with a .newsrc containing the banned newsgroups you wish to read and type "rn".

You can set up an account at a freenet and read the group from there. For example, you can telnet to "bbs.oit.unc.edu" and set up an account by entering "launch" as your login name. Just follow the instructions and you will have a new account which you can use in the future.

Thus, among Canadians who knew and cared about the case, the publication ban was at least ineffective, if not counterproductive, in keeping the secrets the Crown thought important. Arguably, the speculation and rumor that was available to the Canadian public through alternative media was more damaging to the objectivity of prospective jurors than the information actually presented at Homolka's trial. To the rest of Canada, the ban was unnecessary.

Presumably, however, the Court would not measure the efficacy of the publication ban solely or even primarily by the degree to which prohibited information had become available. The interest sought to be protected here was not merely Paul Bernardo's right to a fair trial but, in Justice Kovacs's own view, Canadian society's interest in the integrity of its judicial process.<sup>662</sup> And on that score, the publication ban had quite the opposite effect.

At the most basic level, the publication ban prevented Canadians from knowledgeably considering the decision to charge Karla Homolka with manslaughter and sentence her to twelve years in prison. The presumption, of course, was that she accepted an offer by the Crown to plead guilty to two counts of manslaughter and testify against Paul Bernardo. But there was no authoritative information available to suggest that Homolka deserved such lenient treatment or that her testimony was essential to the Crown's case against Bernardo. Thus, Canadians were deprived of the chance to examine the performance of police, prosecutors, and the court in a matter of the highest public interest and concern. Instead, they were left with rumor, surmise, and speculation, even as to the plea Homolka entered, for two years or longer.

Moreover, because of the ban, Canadians saw first-hand an official capacity for repression that seemed irreconcilable with that nation's democratic tradition: police detaining their countrymen at the border

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Log in to the telnet site "137.113.10.35" (Washington and Lee University) under the name "lawlib". This site has a massive gopher/usenet reader section for those who need alternate sites from where they can read the banned newsgroups. This is important for people currently reading news from systems like CRS, who have been cutting off newsgroups left right and centre (sic).

Numerous posts from this newsgroup have been crossposted into other newsgroups which your site might carry.

The Paul Teale/Karla Homolka Frequently Asked Questions List (FAQ) version 3.0 (last modified June 10, 1994) (visited Jan. 4, 1998) <<http://www.cs.indiana.edu/canada/karlaFAQ.v30>>.

662. *R. v. Bernardo*, [July 5, 1993] No. 125/93, O.J. No. 2047, paras. 77-93 (Ont. Gen. Div.) (unpublished) (visited July 13, 1997) <<http://www.cs.indiana.edu/canada/MediaBan>>.

and confiscating copies of newspapers;<sup>663</sup> bookstore clerks pulling magazines off the shelves under threat of prosecution; college students reading and writing about the Homolka trial through untraceable computer addresses because their own facilities were being monitored; cable television programs being blacked out, replaced, or edited lest they reveal prohibited information; even the gimmicky self-censorship of the first book on the case, sold with a postcard for requesting copies of redacted material once the ban was lifted.<sup>664</sup>

Finally, and perhaps most damaging, the ban made the Canadian legal system look foolishly anachronistic. One need not look to the concededly radical American model for a point of reference. In the *Spycatcher* cases, even the House of Lords moved beyond chauvinistically protecting outmoded prerogatives to accept the reality of global communications.<sup>665</sup> Indeed, one may draw an analogy between Britain's failure to ban imports of *Spycatcher*, clearly a factor in the House of Lords' finding that a publication ban would be ineffective,<sup>666</sup> and Ontario's failure to stop its citizens from bringing single

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663. A leading Conservative politician summed up the widely held sentiment that the ban had failed, that continued enforcement was irrational, and that confiscating newspapers at the border looked "pretty silly." William Walker, *Rae Slams 'Disrespectful' U.S. Media*, TORONTO STAR, Dec. 1, 1993, at A1, quoting Conservative Party Leader Mike Harris.

664. See, e.g., DAVEY, *supra* note 625.

665. Compare Lord Ackner's observation in *Attorney Gen. v. Guardian Newspapers Ltd.* (No. 1), 3 All E.R. 343, 363 (1987):

My Lords, English justice will have come to a pretty pass if our liability to control what happens beyond our shores is to result in total incapacity to control what happens within our very own jurisdiction.

....  
If the publication of this book in America is to have, for all practical purposes, the effect of nullifying the jurisdiction of the English courts to enforce compliance with the duty of confidence both by interlocutory and by permanent injunction, then, as counsel for the Attorney General ruefully observed, English law would have surrendered to the American Constitution.

With the prevailing sentiment of Lord Griffiths in *Attorney Gen. v. Guardian Newspapers Ltd.* (No. 2), 3 All E.R. 545, 651-52 (1988):

The Attorney General therefore submits that despite the fact that *Spycatcher* has received worldwide publication and is in fact available in this country for anyone who wants to read it, the law forbids the press, the media and indeed anyone else from publishing or commenting on any part of it, saving only that which has already been referred to in the judgments of the courts. If such was the law then the law would indeed be an ass, for it would seek to deny to our own citizens the right to be informed on matters which are freely available throughout the rest of the world and would in fact be seeking in vain because anyone who really wishes to read *Spycatcher* can lay his hands on a copy in this country.

666. See *Attorney Gen. v. Guardian Newspapers*, 3 All ER 545, 645-46 (1989) (observation of Lord Keith of Kunkel).

copies of offending American newspapers across the border<sup>667</sup> or to initiate contempt proceedings against Canadian newspapers under the *sub judice* rule.<sup>668</sup>

Political borders are increasingly irrelevant to the movement of ideas and information from person to person throughout the world, and the legal regime that fails to acknowledge and adapt to that phenomenon invites disrespect, disobedience, and ridicule. *Dagenais* is only the beginning of a process that will ultimately chip away at the power of Canadian judges to close courtrooms and bar press coverage of criminal trials, a process that will bring the Canadian judicial procedure into the era of unrestricted global communications.

Although the American free press tradition and the power of the U.S. communications media contributed to making Justice Kovacs's publication ban ineffective, the "ban breakers" who disseminated their own and American press accounts of the Karla Homolka trial were Canadians, not Americans. The jurists who chose to make ineffectiveness legally significant were citing Canadian, not American, precedents and expressing Canadian, not American, constitutional values. And whatever modest American encroachment across Canadian borders may have occurred in this case, Canadians remain in full control of their own cultural identity, legal values, and national sovereignty.

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667. See *supra* notes 319-21 and accompanying text.

668. See *supra* note 135 and accompanying text.